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| In the Matter of | : | |
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| HENRY C. SYMONETTE | : | Case No. 2001-LHC-02481 |
| Claimant | : | OWCP No. 6-179116 |
| v. | : | |
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| GOLD COAST STAFFING, INC. | : | |
| Employer | : | |
| | : | |
| and | : | |
| | : | |
| RELIANCE NATIONAL INSURANCE COMPANY | : | |
| Carrier | : | |
| | : | |
| and | : | |
| | : | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS | : | |
| Party in Interest | : | |

Before: Stuart A. Levin
Administrative Law Judge

## Decision and Order

This matter arises pursuant to a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 910, et seq., filed by Henry Symonette of Palm Beach Gardens, Florida. The Act is designed to compensate employees for loss of wage-earning capacity attributable to employment-related injury upon the navigable waters of the United States, including any adjoining wharf, pier, dry

dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, dismantling, or building of a vessel. See 33. U.S.C. §903. *See*, Marsala v. Triple A South, 14 BRBS 39 (1981); *See also*, Reed v. S.S. Yaka, 373 U.S. 410, 415 (1963); Rodriguez V. Compass Shipping Co. Ltd., 451 U.S. 6596, 616-17 (1981). Symonette claims he sustained back and foot injuries while working as a carpenter repairing and installing wooden fenders on the drawbridge at Lighthouse Point, Broward County, Florida, and has not worked steadily since.[1] Tr. 181-182. He was paid $9,045 in temporary total and impairment benefits from September 23, 1997 to January 19, 1998 and February 3, 1998 to April 13, 1998, and $22,092.20 in medical benefits under the Florida Workers' Compensation Act. Tr. 68-69.

A formal hearing convened in accordance with the Administrative Procedure Act, 5 U.S.C. §500, et seq., in Fort Lauderdale, Florida, on December 13, 2001.[2] Thereafter, Symonette was afforded time to submit additional evidence and the employer was granted time to respond. (Tr. 29-34).[3] Both parties were also granted

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[1]Although he had been urged prior to and at the hearing to seek the assistance of an attorney, (*See, e.g.* Order, Dec. 11, 2000; Notice, Sept. 14, 2001), Claimant decided to proceed in this matter *pro se.* It appears that claimant has consulted several attorneys, but ultimately was unsuccessful in establishing a mutually satisfactory attorney/client relationship. Tr. 1-14. Nevertheless, at the hearing Claimant was again urged to get counsel, advised that I believed it was in his best interest to secure counsel if he could, and told that he would be granted a continuance for that purpose if he agreed. Tr. 14-16, 21. After affording him an opportunity to consider the course he wished to pursue, Claimant decided he would proceed *pro se.* Having read Claimant's many filings, having observed at the hearing that he was cogent and articulate in expressing his views, having considered that he has attended college level courses and was a licensed builder who, in the past, operated his own business, Tr. 10, I concluded that Claimant understood the nature of the proceedings and clearly demonstrated the mental capacity to make important decisions in his own interest. Accordingly, I granted his request to proceed. Tr. 22-23.

[2]The foot injury allegedly occurred "about two weeks before 9/19" back injury. Tr. 75, 170. Claimant did not wish pursue a claim for a foot injury at the hearing. Tr. 171.

[3] Exhibits, including those submitted post-hearing by Symonette, and hereby admitted evidence will be designated as follows: Cx- for Claimant's exhibits, Ex- for Employer's Exhibits, and Tr. for the official hearing transcript.

leave to file comments and argument post-hearing, and their views have been carefully considered. [4]

## Background

The record shows that Henry Symonette worked for Gold Coast Staffing, a small company that handled and temporarily supplied skilled and unskilled labor to local area businesses in south Florida.[5] Tr.185. Gold Coast hired Symonette after he responded to one of its weekly newspaper ads seeking carpenters, and placed him on a six to eight week carpentry project in Hollywood, Florida. When Symonette moved to Fort Lauderdale, he asked Gold Coast to reassign him to a project that was closer to his new residence. Approximately two to three weeks later, Gold Coast initiated contact with PCL Civil Constructors ("PCL"), which was seeking temporary employees for a bridge repair project at the Hillsboro Inlet. ("Hillsboro Project"). After an interview with John Williams, a PCL superintendent, and a physical examination described as a drug test, Symonette was was assigned by Gold Coast to PCL to work as a carpenter on the Hillsboro project.

The record shows that Symonette worked on the PCL project from August 11 through September 22, 1997. Each morning, he reported to the PCL onshore site where

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[4]In his post-hearing submission dated March 11, 2002, Claimant contends that he was "denied discovery by the defense attorney," and suggests he was not afforded adequate time prior to the hearing to review defense exhibits. Claimant represented at the hearing, Tr. 41, that he had requested discovery prior to the time this matter was, at Claimant's request, remanded to the District Director for a DOL scheduled IME. *See,* Order issued 12/11/2000, 2000 LHC 2563. Following the IME requested by Claimant, the District Director, on June 19, 2001, again submitted the matter for hearing, and it was logged in as Docket No. 2001 LHC 2481. It does not appear, however, that Claimant renewed his request for discovery, and he did not seek to compel production of any information. Tr. 42-43, 46-47. At the hearing, Claimant offered evidence which he had not exchanged,( See, Tr. 30-31), and in addition, mentioned that he had evidence which he did not bring to the hearing, Tr. 33. He was afforded 10 days post-hearing to submit the evidence he had left home. Tr. 34. It also appeared the Employer's exhibits 8, 12, 13, 21, 23, and 24 had not previously been exchanged. (See, Tr. 47). Accordingly, both Parties were afforded sixty days post-hearing to respond to evidence both had exchanged late. Tr. 31-32; 47-48; 51. Claimant, in response, submitted medical evidence post-hearing; the Employer did not.

[5]Gold Coast ceased operations in March, 1999. Tr. 196. Its carrier, Reliance National Insurance Company has been liquidated, and its obligations in this matter were assumed by The Florida Insurance Guaranty Association.

he attended a safety meeting and received his daily assignment from the PCL manager. Tr. 162-163. Although he worked onshore occasionally, he primarily worked with two other men on a twelve by twenty-four foot barge which was pushed by a 23 foot craft known as a Rabollo, (Ex 7, pg 15). The Rabollo was powered by an outboard motor which pushed the barge from PCL's dock to the bridge each morning, where it tied off and the bridge work was performed. Tr. 166, Tr. 82, 165. Claimant's coworker, Larry Lytle was the only individual on the project authorized to operate the Rabollo and take the barge out to the bridge and back; however, Claimant testified that he steered the Rabollo "a couple of times" while Mr. Lytle "had to do something else." (EX-2 at 263, 266; EX-7 at 579-580; Ex-22 at 942). The barge itself could not navigate without the Rabollo or another piloting vessel because it lacked an engine and steering mechanism. Symonette did not repair or maintain the barge or the Rabollo. Ex 7, pg. 18. Most of time, he stood on the barge or the Rabollo which were used as a work platform while he worked on the bridge fenders. Tr. 166; Ex 7, pg. 16.

At the time of the hearing, Symonette was 49 years old, a high school graduate with two years of college, and a work history which included licenses as a general contractor in Maryland and Delaware where, until 1992, Symonette ran his own construction company, CKG Construction Company, with a partner. His licenses are subject to renewal should he return to Maryland or Delaware. More recently, Symonette has worked for temporary employment agencies and performed "odd jobs." Tr. 181-182. He described his current complaints as "A deteriorating condition unique unto itself," (Ex-22 at 877), with radiating low back spasms; severe sleep deprivation; pain and spasms related to his L4-5 and S1 area; weakness and feelings of permanent nerve damage in his legs; moderate to severe pain that rates from 5-9 and sometimes 10 on a scale of 1 to 10; numbness radiating from his lower back to his left toe; and severe and intense headaches he refers to as migraines. (Ex-22 at 877-880; 890-892; 895-8, 931-2, 987).

Despite his aches and pains, Symonette testified that he could lift "thirty, fifty pounds, maybe more. I don't know," (Ex-22 at 980), take care of his daily living needs, and work in the garden, including raking, pruning, and mowing with an electric lawn mower. (Ex-22 at 980-981). Symonette did not know how long he could sit or stand before having a problem, (Ex-22 at 983-4), and denied that there were any days when he was pain free. On some days his pain is milder; however, he testified that the pain is always between 5 and 10 on a scale of 1 to 10. (Ex-22 at 891-2). On a "good day," he stretches and can walk or ride his bicycle, and swim in the ocean for "aqua

therapy." Symonette said that he did not swim very far and the did not ride his bicycle every day. (Ex-22 at 892-5). He further noted that he has Florida Temporary Disabled Persons Parking Identification Permit which expires in August of 2002. (Cx-1).

Average weekly wage

In this proceeding, the Employer contends that Claimant's average weekly wage is $250.00. Tr. 72. Claimant contended at the hearing, and did not revise his earnings post-hearing, that "at a high figure" he earned $13,000 in the year prior to the injury. Tr. 77-78. He acknowledges that he has not filed a tax return since 1990 or 1991, claiming that was the last time he earned enough money to file a tax return. (Tr. 71, 135; Ex-1 at 107-108). He received unemployment compensation for two to three weeks in 1998, but his benefits were discontinued because he had not earned enough credits to receive additional assistance. (Ex-1 at 108). Claimant does not contend that his actual wages are unrepresentative, (*See,* Todd Shipyards Corp. v. Director, 545 F.2d. 1176 (9th Cir. 1976)), however, the record does not show that he worked substantially the whole year before his injuries. Empire United Stevedores v. Gatlin, 936 F.2d. 819 (5th Cir. 1991). Section 10(c) would therefore seem the most appropriate provision to apply in this situation; however, the fact that Claimant voluntarily withdrew from the labor market for over six years (Tr. 135) and returned to temporary assignments thereafter are factors which must be taken into account in determining whether his actual wages, ( Hayes v. P&M Crane Co., 23 BRBS 389 (1990); Harrison v. Todd Pac. Shipyards, 21 BRBS 339 (1988)), constitute a fair and reasonable approximation of his annual earning capacity. Empire United Stevedores v Gatlin, *supra*; Richardson v. Safeway Stores, 14 BRBS 855 (1990).

While the foregoing considerations suggest that Claimant's actual earnings may be less than his earning capacity, I find that his actual earnings should be used here because Claimant appears to have essentially departed the labor market voluntarily for a considerable period of time following the failure of his construction business in 1990 or 1991. Over an extended period of time, Claimant has exhibited the pattern of an absence of significant earnings. (Ex 1, 107-112; Ex 2, 28-33; Tr. 77-78). Under such circumstances, the Board has held that it would be manifestly unfair to hold an Employer responsible for a claimant's pre-injury removal of himself from the workforce. Geisler v. Continental Grain Co., 20 BRBS 35 (1987); Harper v. Office Movers, 19 BRBS 128 (1986); Conatser v. Pittsburg Testing Laboratories, 9 BRBS 541 (1978).

Thus, dividing the actual earnings of $13,000 by 52 in accordance with Section 10 (c) and (d), and the factors discussed above, it appears that Claimant's average weekly wage is $250.00 per week which actually equals the minimum compensation rate of $250.00 per week. As previously noted, Claimant does not contend that his actual wages are unrepresentative, and his own historical earnings estimate would not justify a higher rate.

## Preexisting Conditions

The evidence of record establishes that Symonette has sustained three prior back injuries and was receiving chiropractic treatment for pain related to the latter of the three at the time of the 1997 incidents.

## The First Back Injury

The record shows that Symonette, at age eighteen or nineteen, was a passenger in public bus which collided with a car in Coconut Grove, Miami, Florida. Symonette stated that he was "violently shaken" or "jostled" in the accident. He injured his low back and was hospitalized for a week or two. Symonette testified that he recovered three to four months later; however, he informed Dr. LeRoy in 1988, while being treated for a second back injury, that it took him one and one-half years to return to his normal lifestyle after the bus accident. (Ex-10 at 676; Tr. 136-7; Ex-1 at 22-33; Ex-2 at 220-221).

## The Second Back Injury

Symonette injured his low back again on October 5, 1985, while working as a shore-side carpenter retrofitting a drawbridge in Delaware. He and a co-worker were lifting a form board--part of a wall formed out of plywood-- when the co-worker dropped his end, causing the injury to Symonette's lower back. (Ex-1 at 21, 33-36, 53-54). He was treated at a hospital in Milford, Delaware (Ex-1 at 45), and remained off work for several months. (Tr. 138; Ex-1 at 36-37, 46-47). This injury, he noted, resided at the L4-L5 level, (Tr. 139; Ex-1 at 39), in the same general area of his back that he injured in the previous bus accident. (Tr. 138-9; Ex-1 at 36-37). He experienced intermittent permanent partial left leg pain from 1985 through 1990 or 1991, (Ex-1 at 73-4), for which he received treatment. (Tr. 139; Ex-1 at 38). Symonette testified that after the 1985 accident, "a lot of different things were

happening in correlation to the L4-L5," including sciatic spasms, sharp pains in the leg and back, and numbness (Ex-1 at 74-75).

The record shows that, in addition to receiving intermittent chiropractic treatment, Symonette began treating with Dr. Pierre L. LeRoy, a neurosurgeon, on June 1, 1988. (Ex-10; Ex-2 at 223-4). At Dr. LeRoy's direction, Symonette completed a Hendler Pain Test at the Delaware Pain Clinic on June 5, 1988. (Ex-10 at 668-675). Although he did not complete one section of the test, the interpretation of his score, even accounting for the possible points for questions he did not answer, indicated that Symonette was "an exaggerating pain patient." (Ex-10 at 668). Thereafter, a June 8, 1988 CT scan of the lumbar spine showed no evidence of a herniated disc or other significant intraspinal pathology. The L5-S1 level showed moderate degenerative arthritic changes of the facet joints bilaterally--facet disease at L5-S1. (Ex-10 at 667). A June 21, 1988, EMG revealed "cons. radiculopathy L4-5-S1." (Ex-10 at 658, 666).

Upon Dr. LeRoy's referral, Symonette received a Work Tolerance Evaluation and Cybex Evaluation of the lower extremities at Rehabilitation Consultants, Inc. on July 21, 1988, (Ex-10 at 659-665). The evaluation revealed, "submaximal effort throughout the Cybex testing. Minimal standing limitations." (Ex-10 at 661). Specifically, the report also stated, "Overall, this client demonstrated minimal limitation for continuous standing within the constraints of this evaluation. ...When allowed to alternate between sitting and standing and walking, this client appears capable of remaining active for a complete eight hour day - provided the restrictions set forth in this evaluation are adhered to." (Ex-10 at 661). It was noted that Symonette's left upper leg measured one inch less in girth than the right upper leg (Ex-10 at 660). At a July 25, 1988 follow-up, Dr. LeRoy diagnosed Symonette with thoracic myosotis, lumbosacral strain with sciatica (L), and lumbar facet syndrome L5-S1, and released him for light duty (Ex-10 at 657-8). At a November 11, 1988 follow-up, Dr. LeRoy noted that Symonette felt his symptoms were getting worse despite treatment and were aggravated by activities of daily living. On this occasion, Dr. LeRoy added a diagnosis of cervical-dorsal myosotis, and released Symonette for light duty. (Ex-10 at 653-654).

From December 12 through 14, 1988, Symonette was admitted to St. Francis Hospital with progressive worsening of low back pain with left leg radiation. Dr. LeRoy was his attending physician. Symonette reported that his symptoms were

aggravated by daily living and work, but that he continued his employment on a light duty basis as a carpenter and contractor. A December 13, 1988 myelogram showed no lesions, however, Symonette received a lumbar nerve root block at the L4 facet area, and was diagnosed with lumbosacral strain with sciatica, left, improved, and lumbar facet syndrome. (Ex-10 at 646-652; Ex-19).

The records indicate that Claimant continued to treat with Dr. LeRoy throughout 1989 and into 1990. His diagnoses remained unchanged from 1988. (Ex-10 at 633-645). By January 1990, Symonette reported that his symptoms had doubled in intensity and that he was experiencing headaches and sleep discomfort. He recalls receiving a permanent impairment rating of 10-15% from Dr. Leroy as a result of the 1985 injury, however, there is no direct evidence of this impairment rating in the record. (Ex-2 at 239-240).

The Third Back Injury

On January 28, 1993, in South Dade County, Florida, Symonette's pickup truck collided with an AMOCO gasoline tanker. (Tr. 148-9; Ex-1 at 93-6; Ex-2 at 232-3; Ex-18 at 809). He sustained injuries to his low , mid back, and left lower extremity, (Ex-18 at 809), and teated with Drs. Serge Nakache, an orthopedic surgeon, Dr. Paul Wand, a neurologist, (Ex-2 at 233-4; Ex-17; Ex-18), and Dr. Solomon, a chiropractor. (Ex-2 at 233-4). Symonette's physical complaints after this accident were similar to those he expressed following his earlier injuries and the affected areas were very much the same. (Tr. 153; Ex-1 at 99; Ex. 2 at 239-240).

Dr. Serge Nakache treated Symonette from January 29 to June 18, 1993. (Ex-18). Dr. Nakache's initial report noted Symonette's past history of the 1985 work-related back injury but not the first back injury sustained in the bus accident. Symonette complained of fatigue, headaches, shock, mid and low back pain, and left lower extremity pain. His final report of June 18, 1993, notes that Symonette reported intermittent pain in the low back with intermittent shooting pain to the left lower extremity. X-rays were reported as negative for fractures or dislocations. Dr. Nakache diagnosed thoracolumbar sprain and strain, left sciatica, and left lower extremity injury.(Ex-18 at 809-810). He noted that, while Symonette still suffered sequelae from the January car accident, he had reached maximum medical improvement (MMI) with a 7%-8% permanent partial orthopedic disability of the body as a whole as a result of

the accident. Dr. Nakache recommended an MRI and neurologic consultation. (Ex-18 at 811-812).

An MRI of Symonette's lumbar spine was adminstered on October 16, 1993. Dr. Graciela Pozo, diplomate of the American Board of Radiology, reviewed the MRI and provided the following impression:

> Small subligamentum disc herniation noted at the level of L-4-L5 producing encroachment and effacement on the anterior aspect of the spinal canal centrally and toward the left. (Ex-16).

The records indicate that Dr. Wand treated Symonette on August 10 and October 28, 1993. (Ex-17). His August 10, 1993, report records a past medical history including the 1985 "workman's comp. injury" resulting in a 10-15% permanent partial disability from Dr. LeRoy (Ex-17 at 806). Knowledge of Symonette's back injury from the previous bus accident is not indicated. Dr. Wand described the 1993 car accident and recorded that Symonette treated with an "unknown" doctor who prescribed medication, which he did not take, and physiotherapy, which did not help. Symonette also reported that he received about four months of physiotherapy and adjustments from Dr. Jeffrey Solomon, D.C., and about six weeks of physiotherapy from Dr. O'Balle, D.C.

Dr. Wand reported that Symonette complained of numerous aches and pains effecting his head, neck, left shoulder, dorsal-scapular, low back, and left leg. He complained that his left leg was "extremely weaker" than the right. Dr. Wand's impression included: post-traumatic headache; post-traumatic vertigo; cervical strain; the possibility of right cervical radiculopathy; right greater than left carpel tunnel syndrome, should be investigated; lumbosacral strain, with aggravation of prior condition, the possibility of left lumbosacral radiculopathy, herniated nucleus pulposus, should be investigated. (Ex-17 at 805-807). Following a review of the October 16, 1993 MRI, Dr. Wand, on October 28, 1993, confirmed the additional diagnosis of subligamentum herniated nucleus pulposus L4-5 and left lower extremity radiculopathy with atrophy to the left calf. Dr. Wand noted that Symonette was not working. (Ex-17 at 803-804).

This back injury incapacitated Symonette for about eighteen months. Thereafter,

he stated that he was able to resume normal work to the "fullest capacity" that he could. (Ex-1 at 105). He filed a suit against AMOCO, but eventually fired his attorney and ended up receiving no damages. (Ex-1 at 96-7, 100). The record shows that Claimant experienced low back pain consistently from 1993 to 1997 and visited his chiropractor frequently during this period.

## On-The-Job Injuries In September, 1997

Against this background of low back symptomology and pathology, the record indicates that Symonette was involved in three work-related incidents. He testified that about two weeks prior to September 19, 1997, while working on the fender system, he dropped a large pry bar on the big toe of his left foot (Tr. 75). Symonette indicated that despite several conversations with a foreman regarding the need to fill out an injury report, none was ever completed. (Tr. 170-171). He raised it merely as "testimony of record as to basically how things were managed there at PCL," (Tr. 171), however, he testified twice during depositions regarding the foot injury, sought treatment for it on September 22, 1997, when he was sent specifically for care of his back injury, and has attempted to link it to the back injury. (Ex-1 at 123).

Thus, Symonette noted at his August 23, 2000, deposition, (Ex-1), that he dropped a pry bar on one of his toes, but he was unsure whether that injury was part of his "lawsuit." (Ex-1 at 124). At a subsequent deposition on September 13, 2000, (Ex-2), he testified that the foot injury occurred on or about September 5, 1997, but that he could not remember which foot had been injured or when the injury occurred in the course of the day. He stated that he was pretty sure that he reported the injury that same day to Bob, a foreman designated to complete accident reports,[6] but he did not fill out a report and believes a report was not completed. He alleged that two co-workers, Larry Lytle and Peter Barron, were present on the barge and knew of the injury which kept him out of work for a couple of days, but Symonette acknowledged that he did not seek medical attention for his foot injury until September 22, 1997. (Ex-2 at 183-9). At the hearing, Symonette mentioned the foot injury but explained that it was not part of the instant claim.

[6] John Williams of PCL testified that Bob White was a direct employee of PCL who acted as the foreman leading the concrete barrier wall on the Hillsboro Project. (Ex-7 at 578).

Claimant recounted the September 19 and September 22, 1997 back injuries at the hearing and during three prior depositions. (See Tr. 64-5, 87-100, 166-7; Ex-1 at 119-152; Ex-2 at 181-3, 206-208, 278; Ex-22 at 945-962). While his accounts vary in detail, he credibly testified that sometime between 1:00 p.m. and 1:30 p.m. on September 19, 1997, the tides around Lighthouse Point were running at storm-force when he and two other carpenters attempted to secure the barge to the north side of the bridge fender system. Larry Lytle was piloting the Rabollo as Symonette attempted to tie the barge to the bridge fender. The strong current of the outgoing tide apparently overwhelmed the small motor on the Rabollo, and the barge began to drift away from the fender. Tr. 87-88. As the tide pushed the barge away from the bridge, Symonette found himself outstretched between the fender system and the ebbing barge. Barron and the steel superintendent were, according to Claimant, "standing above" and "laughing about the whole thing." (Ex-1 at 125-8). As the gap between the fender and the barge widened, Symonette realized he had to jump from the barge to the fender system or he was going to fall into the drink. He jumped, and, in the process, hit the fender with his stomach. He testified that with the impact of the jump he experienced pain in his stomach, chest, and low back, Tr. 90-91, but he did not seek medical treatment that day. Tr. 166-67.

After considerable effort against the running tide, Lytle finally maneuvered the barge-Rabollo configuration back to where Symonette was stranded. By the time he and Barron picked up Symonette, it was close to the end of their 3:00 p.m. work day and the three men returned to the PCL dock. (Tr. 87-93, 166-7). Symonette testified that he reported his injuries to Lytle, the "crew leader," though it was Bob's (White) responsibility to fill out the accident reports.

The record shows that Symonette never asked to fill out an incident report on September 19, 1997.(Ex-22 at 962). Symonette sought no medical attention for his injury on Friday, September 19, or over the weekend. Waggoner testified that he received a call from Williams at PCL on Friday advising that he wanted to terminate Symonette's employment with PCL and that he was not to return to the jobsite. Tr. 189, 217-218. Waggoner further testified that he called Symonette on Friday evening and left a message on his answering machine not to report to PCL on Monday morning. Tr. 218-219. Claimant denies that he received a phone call from Gold Coast on Friday evening advising that his services at PCL were no longer needed, Tr. 177, or that Williams informed him when he reported to work on Monday morning. Tr. 177-178. To the contrary, he testified that he reported to work as usual on Monday morning,

September 22, 1997, and worked at his regular job from 7:00 A.M. until about 10:30 A.M. Tr. 167, when he picked up a heavy core drill used to drill bolt holes through concrete piers and felt a sharp pain and "great spasms" in his low back, "right where the L4/L5/S1 area is," Tr. 93-95, 170, and radiated down both legs and up his back. Tr. 95-96. He testified that he reported the injury to the PCL project manager who telephoned Gold Coast. According to Symonette, Gold Coast directed him to report to Pompano Workers' Comp Medical Center. Tr. 97, 173. On Monday morning, September 22, 1997, he returned to work at 7:00 a.m., (Tr. 93, 166-7; Ex-1 at 130), and remained on the job until approximately 10:30 a.m., performing his normal job duties. At about 10:30, he lifted a fifty to one-hundred pound core drill (Tr. 93-95; Ex-1 at 129-131), when his back "went out." (Ex-2 at 182). It was then, he testified, that he realized how badly he had been injured the previous Friday. (Tr. 95; Ex-2 at 181). Symonette testified that he felt sharp pain and "a great degree of spasm," in his low back, with radiating pain down both legs and up his back. (Tr. 95-97).

Symonette claims that he reported the incident to the project manager, Gary Dale who then called Douglas Waggoner at Gold Coast and handed Symonette the telephone. Waggoner denied that he received a call from PCL, and told claimant to go to the medical center only after he showed up at his office following his dismissal by Gary Dale, PCL's site manager. Tr. 200, 202-203. Claimant testified that he never went to Waggoner's office on Monday. Tr. 203. He recalled that Waggoner directed him to go to the Pompano Beach Workers' Compensation Medical Center and advise him when he arrived there. Since neither employer provided him transportation, Symonette had to walk a mile to the bus stop where he caught one of two buses which eventually took him to the Medical Center. (Tr. 97-98). He arrived at the Medical Center at approximately 12:00 p.m. and had the Medical Center call Waggoner as Waggoner had requested. Symonette testified that Waggoner had called ahead to the Medical Center to inform them that he would be coming in for treatment. (Tr. 100, Ex-11; Ex-2 at 369). Gold Coast requested that Symonette have someone from the medical center call when he arrived and the call was made. Symonette was processed, and a physician at the Medical Center then filled out an incident report (Ex-22 at 964). Thereafter, he was attended by Dr. Dacus and Dr. Berkowitz, Tr. 100, 173, and went to the clinic for therapy for about two weeks. Tr. 109.

Medical Evidence

The medical records in evidence show that Symonette received treatment from time to time during the period September 22, 1997 through October 3, 1997 at the Pompano Beach Workers' Compensation Medical Center. (Ex-11). In contrast with Symonette's hearing testimony that he injured his back lifting a core drill while aboard the barge on the September 22, his accident report completed by the Medical Center states: "The patient states that due to some foot problems which he is reporting as work related injuries, but apparently not approved for therapy, is having some back pain; this back pain began yesterday in the central lower back with radiations into the left leg, which he has had previously." On September 25, 1997, Symonette returned to the Medical Center and was treated by Dr. Dale Dacus. Dr. Dacus noted as part of Symonette's current accident history that, "He is having some foot problems. These appear to be separate and is being seen also for those today as new injuries." In the "Diagnosis" section of that same report, Dr. Dacus noted, "He is seeking care for his right foot which apparently had not been authorized. He does incidentally tell me that his right foot was injured at home but aggravated at work." When Symonette saw Dr. Leonard Rosendorf at the Medical Center, Dr. Rosendorf recorded that Symonette's left foot was neither fractured or dislocated. (Ex-11). When asked about his September 25, 1997 conversation with Dr. Dacus during his October 5, 2000 deposition, Symonette said that he did relay a foot injury history to Dr. Dacus, stating, "I stubbed it on a piece of metal coming out of the concrete walk that surrounded the cottage that I lived in." (Ex-22 at 968-9).

Gold Coast maintains that it had no knowledge that this injury occurred. Williams, of PCL, testified that despite PCL's conduct of weekly safety meetings and a requirement that all workers report any unsafe condition, accident, or incident to him, he had no knowledge of any of Symonette's injuries until someone from Gold Coast called him several weeks after the September 19, 1997 incident. He further testified that when he investigated the matter and spoke with the two men, Larry Lytle and Peter Barron, who worked with Symonette on the barge, neither recalled any accidents or incidents occurring on the barge. (Ex-7 at 596-8, 604-5). Neither co-worker was called by either party to testify in this proceeding.

According to Medical Center records, Symonette reported an accident history of low back pain with radiations to the left leg which he had experienced previously. The record shows that Claimant related his back pain to his foot problems and stated that the pain in his back began the previous day, which would have been Sunday, September 21, 1997. Medical Center records also indicate that he had experienced two

previous injuries in 1985 and 1993, that he had recurrent sore backs since those injuries, and that he was currently seeing a chiropractor once or twice a month. X-rays were administered and were interpreted as " normal." Dr. Herbert Goldberg, noted that Symonette's lumbar spine exhibited: "No compression fracture, subluxation, disc space narrowing or visible destructive lesion is seen. No other remarkable findings are noted." After receiving a diagnosis of acute and recurrent low back sprain, Symonette was assigned treatment consisting of four days of physical therapy, and was released as "Able to work with the following restrictions: able to lift up to ten pounds; able to push/pull ten pounds; no bending from the waist; do not strain back; and alternate sitting and standing as tolerated." Medical Center notes indicate that while Symonette had no identified physical, cultural, cognitive, financial, or language barriers that might impede his healing, his "pre-existing back problems" were mentioned. Symonette was prescribed Ibuprofen and alternating heat and ice to the back. (Ex-11 at 678-9; Cx-File D).

Claimant returned to the Medical Center on September 24, 1997, where he was treated by Gerald C. Keller, RPT. Keller noted that Symonette presented with "an insidious onset of back pain initially and then he relays a history of lifting a core drill." Symonette complained of low back pain, left hip and left lower extremity symptoms greater than his right. Upon examination, Keller detected that Symonette had grossly intact motor and sensation, "although he complained of some altered sensation on the L4-L5 dermatome on the left." Keller reported that Symonette experienced some tenderness on palpitation to the quadratus and buttocks bilaterally, but twice noted that he had trouble getting consistent responses. Keller prescribed four more days of therapy. (Ex-11 at 679-80).

Symonette returned the following day for follow-up with Dr. Dale Dacus. Dr. Dacus noted that Symonette reported some improvement in his back and recorded a "diagnosis" that Symonette's "LS sprain" was resolving. Dr. Dacus prescribed four more days of physical therapy and released Symonette with the same work restrictions he received on September 22. (Ex-11 at 680; Cx-File D). On that same day, September 25, 1997, Symonette was examined by Dr. Leonard Rosendorf for the injury to his left foot. (Ex-11 at 681). The next day, Symonette was back at the Medical Center with subjective pain and complaints of spasm. He received various forms of physical therapy during a brief visit. (Ex-11 at 681).

Symonette returned to Dr. Dacus at the Medical Center on October 3, 1997. Dr. Dacus's report includes the following:

> The patient reports very little progress since the last visit; he is still complaining of low back pain with radiations into the left leg; these radiation symptoms are vague and non specific, however, he mostly discussed his conflicts with his job activities, stating "The job doesn't care about injuries," and he states physical therapy is not performing the correct treatments, stating he has some fear of re-injury with therapy; he definitely has pre-conceived ideas about what therapy should involve; he is requesting more narcotics and pain relieving medications.

Dr. Dacus's examination revealed "a man in no distress; he can lie, sit or stand comfortably without any apparent discomfort." On September 22, Symonette was able to forward bend forty-five degrees. By October 3, Dr. Dacus reported that Claimant's forward bending had improved to eighty degrees. Dr. Dacus detected "No objective findings" related to Claimant's back, but he mentioned that Symonette was being treated for a left foot contusion. Dr. Dacus diagnosed Symonette with an unresolved L/S sprain and discontinued his medications and physical therapy at the Medical Center's facility, but referred Symonette for an orthopedic consultation. Claimant's work restrictions remained unchanged. (Ex-11 at 681-2).

On October 9, 1997, Dr. Dacus was shown a video tape dated September 29, 1997. The video is not in evidence. Dr. Dacus described the video as showing a man walking beside a bicycle at normal pace for most of the five to ten minutes of footage. On one occasion, he noted that the man was observed bending from the waist to approximately forty-five degrees. Dr. Dacus explained that the man appeared to be Symonette, though he could not clearly see the man's face. Dr. Dacus did not believe that the video showed any inconsistencies with Symonette's foot and back complaints or his medical findings. (Ex-2 at 370; Cx-File D, 1).

Dr. Berkowitz, a board-certified orthopedic surgeon, treated Symonette from November 3, 1997 through April 2, 1998. (Ex-4). Symonette initially saw Dr. Berkowitz on November 3, 1997, with a chief complaint of low back pain. (Ex-4 at 512). Symonette reported a history of a September 20, 1997, injury to his back caused by a jump from the barge he was working. Symonette also reported an injury to his feet

which he said was unrelated to his current back problem. Symonette revealed previous back injuries of 1985 and 1993, but he did not mention an earlier back injury from a bus accident. Dr. Berkowitz recorded the following:

> He has had continuous discomfort since the '93 accident, seeing a chiropractor periodically, complaining of back pain radiating into the left leg. The patient indicates he has a similar feeling now that he has had in the past. What he notes is that it just seems to have been exacerbated. (Ex-4 at 512).

Upon examination, Dr. Berkowitz noted, inter alia, a normal gait, no sensory changes in the left extremity, no obvious motor weakness in the left extremity, and normal reflexes (Ex-4 at 513). Dr. Berkowitz reviewed x-rays of the lumbar spine which showed some narrowing of the L5-S1 disc space and some very mild degenerative changes to the vertebral bodies. Dr. Berkowitz's impression included: mechanical back pain; left leg numbness of unknown etiology; and clear preexisting lower back pain. Dr. Berkowitz explained that "mechanical pain" is pain that comes from the joints in the spine, arthritic pains in the spine. Basically, he said, it is pain from the spinal structure versus pain coming form the nerve structures. (Ex-4 at 485). Dr. Berkowitz recommended light duty avoiding bending and squatting, and aggressive therapy. (Ex-4 at 513). Based on that initial evaluation, Dr. Berkowitz suspected that Symonette would return to his pre-injury level within three to six weeks (Ex-4 at 486).

In his note of Symonette's follow-up visit of December 2, 1997, Dr. Berkowitz noted that Symonette continued to report pain in his back and had only had one therapy treatment since November 3. Dr. Berkowitz continued to believe that Symonette's problem was mechanical pain. (Ex-4 at 514). On December 23, 1997, Symonette reported that he experienced decreasing pain. (Ex-5 at 514).

On January 8, 1998 Symonette reported that he was experiencing back discomfort and leg soreness and had been in the emergency room due to back pain radiating into his leg and up his back into his head.[7] Dr. Berkowitz noted that an MRI

[7] Claimant's Exhibit File D, 1 contains four pages of mottled photocopies related to an "on-the-job injury status report" from North Broward Hospital District, Medwork, dated January 5, 1998. The physician's report is unsigned, but relates a diagnosis of chronic back injury with exacerbation. It appears that medication was dispensed, but the writing is illegible.

was mandatory and it was administered on January 16, 1998. (Ex-4 at 515). Dr. Cary J. Hoffman, a musculoskeletal radiologist, reviewed the MRI results and concluded that they show no evidence of an extruded disc herniation, but indications of a minimal concentric disc bulge at the L4-L5 level slightly asymmetric to the left side and mild narrowing of the proximal left neural foramen without definite encroachment upon the exiting L-4 nerve root sleeve were apparent. (Cx-File D, 1). On January 22, 1998, Dr. Berkowitz reviewed "in great detail" the MRI report with Symonette. He state that Symonette had no disc pathology and that his pain was purely mechanical. (Ex-4 at 516).

On February 2, 1998, Dr. Berkowitz examined Symonette and reviewed a previously ordered Functional Capacity Evaluation (FCE). Dr. Berkowitz noted that the FCE raised some questions about maximum effort at certain parts of the test, but that he thought Claimant would benefit from a work hardening program. (EX-4 at 516-517).

Dr. Berkowitz treated Symonette for the last time on April 2, 1998. Complaining about the discomfort it caused, Symonette did not want to progress beyond three to four hours of work hardening. Dr. Berkowitz noted that a letter from the work hardening facility indicated that they recommended increasing the number of hours and Symonette did not wish to do so. Dr. Berkowitz reported that Symonette probably had some back irritation from the disc bulge at the L4-5 but he did improve with the work hardening as he was now able to lift forty pounds. Dr. Berkowitz opined that Symonette was at Maximum Medical Improvement at 6% of the whole person due to the presence of the bulging lumbar disc. Dr. Berkowitz restricted Symonette to lifting no more than thirty pounds. (Ex-4 at 517).

Dr. Berkowitz was deposed on October 25, 2000. (Ex-4). He reviewed and elaborated upon his treatment of Symonette and explained that the 6% impairment rating he assigned Symonette was based on the Florida Impairment Rating Guide. A similar impairment rating based on the AMA guidelines, 4th edition, according to Dr. Berkowitz, would be 5% based on the same pathology (Ex-4 at 489). He further explained that, if in the future, Symonette's pathology remained the same despite subjective complaints of exacerbation, his impairment rating of 5% would remain the same without an additive factor. (Ex-4 at 490).

At the deposition, Dr. Berkowitz reviewed, for the first time, Dr. Nakache's June

8, 1993, final examination evaluation and the report of Symonette's October 16, 1993 MRI from Flagler MRI. (Ex-4 at 496-7). Dr. Berkowitz testified that the L4-L5 area addressed in the 1993 report was the same area for which he treated Symonette and that Symonette's complaints to him were similar to those reported to Dr. Nakache (Ex-4 at 498). Thereafter, Dr. Berkowitz opined:

> Based on the MRI which shows essentially the same pathology that I observed on the MRI, it would be clear that we [are] dealing with is an exacerbation of preexisting changes to his lumbar spine and not a new injury to the spine on top of what was there before. (Ex-4 at 498).

Significantly, Dr. Berkowitz concluded that as of April 2, 1998, Symonette had returned to his pre-September 1997 physical state. (Ex-4 at 498-9). Finally, Dr. Berkowitz explained that the work hardening program, which Symonette participated in for six weeks until March 27, 1998, is a program offered by physical therapists in an attempt to improve a person's demand level of work (Ex-4 at 494-5). Dr. Berkowitz quoted Symonette's discharge summary from the work hardening program which noted that he had made significant progress in strength, range of motion, endurance and functional capacity. The therapists pointed out that Symonette should be able to increase his capacity to function to four hours daily but that he refused to comply with that recommendation. Dr. Berkowitz noted their further observation that "Symonette was self-limited due to subjective pain complaints that his pain level was high, but without evidence of pain behavior that they described as facial grimaces, limping, vocal expressions of pain, et cetera." (Ex-4 at 495-6).

Dr. Marvin Reinberg, a physical medicine and rehabilitation specialist at the Broward Rehabilitation Center, examined Symonette on November 7, 1997. (Cx-File D, 1). Symonette reported two incidents to Dr. Reinberg. He reported that on September 19, 1997 he was forced to jump from a barge to the wooden barriers of a bridge, injuring his low back and leg. Symonette also reported that two days prior to that incident, he dropped a heavy crow bar, injuring his left foot. Symonette further informed Dr. Reinberg that the crow bar incident was also reported as a workman's compensation injury and that he thought the injured left foot contributed to his second injury. Symonette presented to Dr. Reinberg with persisting symptoms of low back pain, pain radiating to his left leg, and pain in the left knee, thigh and calf. Dr. Reinberg's report included the 1985 "industrial accident," but it did not mention

Symonette's bus accident or his 1993 car accident. Dr. Reinberg's clinical impression was lumbar disc [disease] with radiculopathy on the left and left hip strain/sprain. His prescribed treatment included joint mobilization of associated areas of the spine or extremities, adjunctive physical modalities consisting of hydrotherapy and low voltage galvanic current, and neuromuscular re-education. Dr. Reinberg referred Symonette for an MRI, but the record does reflect whether an MRI was performed specifically in response to his referral. (Cx-File D, 1).

The record contains an evaluation of Symonette, dated December 1, 1997, by Kevin Costello, physical therapist. (Cx-File D, 1). Symonette reported injuring his low back on September 19, 1997. He complained of intermittent moderate to severe low back and left lower extremity pain since the injury in addition to the development of hives on those same areas. Costello noted that Claimant's "Past medical history is remarkable for low back injuries which resolved," and that his current condition included: decreased flexibility, decreased ROM, impaired functional capacity, lumbar radiculopathy, muscle guarding, muscle tension, and pain. In Costello's opinion, Symonette's rehabilitation potential was good, and he formulated a plan which included therapy three times per week for three weeks for treatment, and an independent home program. (Cx-File D, 1).

On July 2, 1998, Symonette visited Dr. Gieseke, a neurosurgeon, complaining about radiating back pain symptoms, despite treatment, still bothered him. (Ex-5 at 522-3). Although the examination records of this appointment are not in evidence, Dr. Gieseke testified at a deposition on October 26 that he obtained a history which included the 1993 car accident (Ex-5 at 528) and the incident in which Symonette was forced to jump to the dock. Dr. Gieseke stated that he was not informed of any other accident that occurred on the barge. (Ex-5 at 523-4), and, apparently, Claimant provided no specific information related to his 1985 back injury or his back injury related to the prior bus accident (Ex-5 at 523-8). Dr. Gieseke was, however, aware of Dr. Nakache's treatment, diagnosis, and assignment of a permanent partial impairment rating of 7-8% to Symonette in 1993. (Ex-5 at 529-530).

During his first examination of Symonette on July 2, 1998, Dr. Gieseke recommended a myelogram with a CT scan, (Ex-5 at 531-2), which were administered on July 14, 1998. (Cx-File D, 1). Dr. R.T. Baker, a radiologist, reported that the AP and lateral films from the lumbar myelogram showed no compression fracture or subluxation. The CT showed mild bulging with some flattening of the ventral surface

of the thecal sac on the L4-L5, but no focal eccentric disc herniation. Mild relative bulging of the L5-S1 disc without significant impression upon the thecal sac was noted. Mild generalized degenerative changes of the lumbar facet levels were also noted, but the study showed no critical overall canal stenosis or definite asymmetric neural foraminal encroachment. In Dr. Baker's opinion, the studies revealed mild bulging of the L4-5 and L5-S1 discs, and fairly mild impression upon the ventral thecal sac which appears to slightly increase in the upright position at L4-5. (Cx-File D-1). Based on the myelogram, Dr. Gieseke opined that surgical intervention was unnecessary (Ex-5 at 532; Cx-File D, 1).

Dr. Gieseke's last report is dated July 15, 1998. (Ex-5 at 532; Cx-File D, 1). At that time, he concluded that Symonette had reached Maximum Medical Improvement with the capacity to perform light duty work as long as he was not required to lift over thirty-five pounds, particularly in a repetitive fashion (Cx-File D, 1). According to the 1993 Florida Impairment Rating Guide, based on the information he had at the time, Dr. Gieseke found that Symonette appeared to qualify for a 5% partial impairment disability of the body as a whole (Ex-5 at 533; Cx-File D, 1). Dr. Gieseke explained that the impairment rating was based on the 1998 MRI showing the bulging disc and the reports shown to him at the deposition (Ex-5 at 533). He further explained that in the future, should Symonette have another MRI which is similar to the 1998 film, and based upon that film, a physician gives him a 5% impairment rating, it would mean that Symonette still had the same 5% impairment rating. (Ex-5 at 533-4).

At the deposition, Dr. Gieseke was presented with an August 11, 1999 report from Dr. Robert D. Burke of Midtown MTI Jupiter Open MRI, wherein Dr. Burke reviewed and compared the MRI of Symonette's lumbar from June 8, 1999, his MRI from October 16, 1993, and the July 14, 1998 myelogram and post myelogram CT. (Ex-5 at 534-5; Ex-9 at 628). Dr. Gieseke explained that disc desiccation noted by Dr. Burke is loss of water content in the disc which is a natural process of aging (Ex-5 at 535). Dr. Gieseke also reviewed the October 16, 1993 MRI report by Dr. Pozo and explained that in lay terms, Symonette had a very small amount of disc pushed out toward the left side at the L4-5 level. This, he said, could be a causative factor with respect to Symonette's complaints of left leg pain and sciatica. (Ex-5 at 530-1). Based on all of the records he reviewed at the deposition in addition to Dr. Burke's report, Dr. Gieseke opined that the September 1997 accident resulted in a temporary exacerbation of a pre-existing problem (Ex-5 at 535-6).

Dr. Donna Watson, a chiropractic physician, referred Symonette to Physician's Diagnostic Systems for various neurological studies which were performed on December 21, 1998, and interpreted by Dr. Jose A. Marquez, a neurologist. (Ex-2 at 400-403; Cx-File D, 1). In regard to the nerve conduction studies of the lower extremities, Dr. Marquez interpreted the findings as indicative of bilateral tibial motor neuropathies, noting that more proximal lesions either in the peripheral nerves or the lumbosacral roots should be considered when evaluating Symonette. In his opinion, the dermatome evoked potentials of the upper extremities revealed findings indicative of bilateral L-4, L5 and S1 radiculopathies, while somatosensory evoked potentials of the lower extremities indicated bilateral tibial central conducting pathway lesions above and including the spinal cord. Dr. Marquez further noted that multiple lumbosacral radiculopathies should be considered when evaluating Symonette. Dr. Marquez recommended a neurologic evaluation and an MRI of the lumbosacral spine. (Ex-2 at 401).. (Ex-2 at 402; Cx-File D, 1).

Dr. Brown, a neurologist, provided Symonette a consultation on January 4, 1999. (Cx-File D, 1). According to Dr. Brown, Symonette recounted a detailed history of his 1985 and 1993 incidents, though he did not mention his earlier bus accident. He indicated that it took him quite a long time to recover from the 1985 accident, but he eventually recovered to the point where his low back and left lower extremity pain was manageable if he stayed within limitations but would recur if he over did it. Referring to the 1993 car accident, Dr. Brown recorded that, "It took about eighteen months before he was back to his previous level of compensation; i.e. if he did not overdo it, he did pretty well. If he overdid it however, he would once again get recurrent low back pain and pain radiating down the left lower extremity." (Cx-File D, 1). Symonette reported the 1997 barge jumping incident, and Dr. Brown noted that Symonette, "thinks he may have jarred his back then but that the injury came the next day when he was lifting a heavy pump." (Cx-File D, 1). Dr. Brown noted Symonette's January 1998 flare-up and admission to the hospital, and considered his various complaints.

Dr. Brown performed a full examination, reviewed Symonette's 1993 and 1998 MRIs, and the nerve conduction studies and somatosensory evoked potentials. Dr. Brown noted that Symonette appeared to walk normally; however he noted that on careful examination, there was a slight left foot drop with difficulty with heal walking on the left side. He noted some weakness and atrophy in the left anterior compartment muscles, noting that while thigh circumferences were symmetrical, calve

circumferences were asymmetrical: the right one being forty-four centimeters, and the left one being forty-one centimeters. Otherwise, he noted that tone and strength were normal and equal.

On review of the nerve conduction studies and somatosensory evoked potentials, Dr. Brown found that they appeared basically normal and that the chiropractor who reviewed them probably over interpreted them. He opined that the most definitive study would be EMG, and that he would perform it on Symonette's lower extremities. Dr. Brown noted that the 1993 MRI showed a very small disc bulge at the L4-5 posterolateral to the left, and that the 1998 MRI showed more extensive bulging of the L4-5 disc, which was still not large. His impression was that Symonette's present condition is a direct result of his most recent accident, the lifting accident of September 1997. He believed Symonette needed more concentrated effort at physical therapy, rehabilitation, and possibly epidural steroids. Dr. Brown stated that believed that surgical intervention was unlikely to become necessary. (Cx-File D, 1).

Dr. Gelblum, board-certified in psychiatry, neurology, and electrodiagnostic medicine, provided Symonette with a neurologic consultation on January 19, 1999. (Cx-File D, 2). Dr. Gelblum noted that Symonette came to him with complaints of chronic low back pain with referred numbing and tingling of the left lower extremity, and episodic weakness of the left foot. Dr. Gelblum recorded that Symonette attributed the onset of his symptoms to a work related accident he suffered in 1997; however, he did not indicate any details of that accident. Significantly, Dr. Gelblum added: "Patient's past medical history is otherwise non-contributory. He was asymptomatic of lumbar complaints prior to this work accident." Dr. Gelblum did not record any report from Symonette or otherwise indicate that he had any knowledge of Symonette's three prior back injuries. Dr. Gelblum's impression was post-traumatic left L-5 radiculopathy, as demonstrated by needle electromyography performed on the left lower extremity that day. Subsequently, Dr. Gelblum prescribed an empiric adjuvant analgesic regimen of Neurotic 400 mgs to alleviate some of the left lower extremity parathesia. (Cx-File D, 2).

Dr. Sassoon, a phsyiatrist, provided a consultation on February 11, 1999. (Ex-2 at 375-8; Cx-File D, 2). Dr. Sassoon recorded Symonette's September 19, 1997, injury from his forced jump from the barge to the dock, which Symonette reported caused him to twist his back. (Ex-2 at 375). His report does not mention a second incident on

September 22 1997, but did note the 1985 and 1993 low back injuries with radicular symptoms of the left lower extremity. Id.

Dr. Sassoon reported that Symonette was currently receiving chiropractic treatment from Dr. Watson. Id. He had access to the reported results from Symonette's previous 1993 and 1998 MRIs, 1998 myelogram, and somatosensory evoked response and dermatomal evoked response studies. (Ex-2 at 376, and conducted a physical examination. Dr. Sassoon's impression after examination was chronic lumbar radiculitis of persistent degree (Ex-2 at 377). He thought that Symonette was not a surgical candidate at that time; however, due to Symonette's persistent radicular symptoms and related findings, Dr. Sassoon considered him a candiate for a facet block or a nerve root block at the L4 level under anesthesiological fluoroscopic technique. He suggested referral to an anesthesiologist for evaluation. Id.

Dr. Watson, a chiropractic physician, provided a letter to Symonette's former attorney dated March 3, 1999. (Ex-2 at 397-8; Cx-File D, 2). In her letter, Dr. Watson explained that Symonette sought her services on November 11, 1998, for treatment of injuries he stated he sustained in a work related injury on September 19, 1997. She reported that he complained of left leg weakness with accompanying sciatic radiation down the left leg. Dr. Watson performed a complete orthopedic, musculoskeletal, and neurological examination, and treated Symonette five times with chiropractic adjustments and physical therapy. She reviewed Symonette's 1993 MRI, but did not mention the 1998 MRI, nor did she indicate any knowledge of Symonette's three prior back injuries or symptomology.

On March 1, 1999, Dr. Watson diagnosed Claimant with lumbar radiculopathy with myofascitis. Towards the end of her letter, Dr. Watson opined: "Based on the current testing available at this time and using the D.R.E. guidelines, I am giving Mr. Symonette a permanent impairment rating of 10-15%. This is subject to change if current x-ray and MRI findings have been updated to reflect significant changes." (Ex-2 at 397; Cx-File D, 2)

Wendy Smith, a physical therapist, provided an initial evaluation and plan of care for Symonette on March 12, 1999. (Cx-File D, 2). The report indicates that Dr. Sassoon ordered a physical therapy evaluation for exacerbation of L5 radiculitis and pain, and physical therapy for spine stabilization exercises. Smith noted a history of a work accident on September 19, 1997, but listed no details. Smith assessed that

Symonette had pain throughout the thoracic/lumbar areas and in the left and right lower extremities, left greater than right. She noted decreased range of motion (spinal, and decreased strength in lower extremities), and concluded that Symonette would benefit from physical therapy for pain management, primarily dynamic stabilization. (Cx-File D, 2).

Dr. Nathaniel R. Drourr provided Symonette a new-patient consultation on April 16, 1999. (Ex-2 at 380-384; Cx-File D, 2). Dr. Drourr noted specifically that Symonette's chief complaint was, "My job-related injury." Dr. Drourr recorded a history of a September 19, 1997 incident wherein Symonette stated that, "he had to jump from one barge to the other and then, while squatting, felt a pop." Dr. Drourr noted Symonette's recent evaluations by Drs. Brown, Sassoon, and Gelblum. (Ex-2 at 380). He noted that on March 3, 1999, Dr. Sassoon gave Symonette a PPI of 9% and restricted him to light duty with no lifting greater than twenty pounds, and no sitting or standing for greater than two hours. A March 3, 1999 report from Dr. Sassoon is not contained within the evidentiary record, though by negative implication, it appears that Dr. Drourr may have reviewed such a report, as he noted that he "unfortunately" did not have Dr. Gelblum's entire evaluation of January 19, 1999. Dr. Drourr recorded a past medical history as notable for a 1993 car accident and a 1985 bridge accident. He did not indicate knowledge of Symonette's first back injury sustained in the bus accident. (Ex-2 at 381).

Dr. Drourr reviewed Symonette's 1993 and 1998 MRIs and his 1998 dermatome-evoked potentials, somatosensory evoked potentials, and nerve-conduction studies (Ex-2 at 382). He explained that he discussed with Symonette his diagnosis of lumbar disc disease with resultant left L4/5 and S1 radiculopathy and the possible treatment options. Dr. Drourr's treatment plan included physical therapy, and continued p.r.n. mild pain relievers. He also considered epidural steroid injections and possibly selective nerve root blocks. (Ex-2 at 383; Cx-File D, 2).

Dr. August J. LaRuffa, a chiropractic physician and board-certified sports physician, treated Symonette from May 7 through August 23, 1999. (Cx-File D, 2). On May 7, 1999, Dr. LaRuffa evaluated Symonette's condition. At that time, Symonette reported constant lower lumbar pain at a level of 9 out of 10. X-rays were deferred, and Dr. LaRuffa diagnosed rupture or herniation of lumbar disc, chronic, moderate; radiculitis (lumbar), chronic, moderate; and muscle spasm, (complicating diagnosis), chronic, moderate. In Dr. LaRuffa's opinion, Symonette's symptoms

appeared to have come on "as a result of a work related accident consistent with the one described in this report."

Although x-rays were deferred and Dr. LaRuffa gave no indication that he received or reviewed medical reports or clinical data relating to Claimant's medical history prior to September19, 1997, Dr. LaRuffa nevertheless opined, "His history, subjective and objective findings, and radiographic examination show evidence, from a medical viewpoint, that his condition is due to the current injury only and even though similar symptoms from a previous condition were reported there is not evidence of any contributing factors." (Cx-File D, 2).

Assessing Claimant's physical capacity, Dr. LaRuffa, upon review of Symonette's prior work requirements, concluded that Symonette could return to monitored regular work duties as long as no additional exacerbations occurred. Dr. LaRuffa opined that Symonette's prognosis was poor due to the pre-existing degenerative changes, history of multiple episodes, unresolved neurological signs, unresolved orthopedic tests, degenerative changes radiculopathy, general health, age, and possible surgical necessity. Symonette submitted a miscellaneous undated page from a report or letter from Dr. LaRuffa which indicated that he felt it was too early to opine whether Symonette's would have any residuals of permanent disability, but it stated that at that time, Symonette's condition was neither permanent or stationary. (Cx-File D, 2). Dr. LaRuffa selected a plan of treatment including chiropractic adjustments and therapy. He ordered an MRI, nerve conduction test, and orthopedic evaluation. (Cx-File D, 2).

Based on Dr. LaRuffa's referral, Symonette underwent an MRI of the lumbar spine on June 8, 1999 at Midtown MRI Jupiter Open MRI. (Cx-File D, 2; Ex-9 at 630). The MRI was interpreted by Dr. Robert D. Burke, who compared it to the January 16, 1998 study. Dr. Burke found a desiccated L4-5 disc with a central disc bulge at L4-5 more prominent at this time than seen on the study of 1998, and mild hypertrophic changes of the ligamentum flavum at the L4-5 level. The rest of the exam remains stable. (Ex-9 at 629; Cx-File D, 2). In an addendum to his June 8, 1999 report, on August 11, 1999, Dr. Burke compared the June 8, 1999 MRI with the January 16, 1993 MRI and the July 14, 1998 myelogram and post-myelogram CT. In comparison with the 1993 study, the 1999 study demonstrated , in Dr. Burke's opinion, slightly more desiccation at the L4-5 level, but the degree of the disc bulge remains

unchanged. He saw no frank herniation, and reported that the rest of the lumbar levels remained unchanged. (Ex-9 at 628; Cx-File D, 2).

In his final opinion, August 23, 1999, Dr. LaRuffa opined that Symonette, whom he treated for an exacerbation of his low back condition, maintains a 5% partial permanent disability (according to the guides for evaluation of Prone Impairment, 4th Edition). Dr. LaRuffa stated that his conclusion in this regard was in agreement with the recommendations of Dr. Gieseke on July 15, 1998. Dr. LaRuffa concluded that due to the nature of Symonette's low back, he would experience exacerbations and would benefit from further conservative care. (Cx-File D, 2).

Dr. David M. Glener examined Symonette on September 30, 1999, on referral from Dr. Roberta Hunter. (Ex-2 at 404-406; Cx-File D, 2). Symonette's history of present illness indicated that he had sustained a fall while on a construction site in September 1997. Dr. Glener noted a history of previous back pain which had largely resolved up until that time; however, he stated that the fall exacerbated the pain and seemed to worsen Symonette's condition. Dr. Glener noted Symonette's treatment history and described an EMG which revealed L4, L5 and S1 nerve root deficit on the left side. He also noted a recent MRI which he reviewed at the time of examination. Considering Symonette's past medical history, Dr. Glener noted occasional headaches and obesity but made no mention of prior injuries to Symonette's lower back. (Ex-2 at 404). Upon examination, Dr. Glener's impression was lumbosacral radicular pain secondary to herniated lumbar discs (Ex-2 at 405). Dr. Glener recommended a series of lumbar epidural steroid injections, but stated, " I have emphasized that this will, in no way, ensure complete pain relief. Moreover, I have stressed that this treatment plan will not remedy the underlying anatomical defects in the lumbar spine." Dr. Glener also emphasized to Symonette that the epidural steroid injections were unlikely to successfully treat his numbness which, he explained, is not likely reversible due to the extended nature of the neuropractic injury, namely two years. (Ex-2 at 406; Cx-File D, 2).

In the meantime, it appears that Symonette was arranging for further physical therapy. It appears that between October 14, 1999 through November 23, 1999, he received ten treatments administered by Dee Dettmann Ahern, a registered physical therapist. (Ex-2 1t 408-411; Cx-File D, 2).

Four days after the Ahern therapy, Claimant visited Dr. Lewis J. Arrandt, a chiropractic physician , who treated him from November 27, 1999 through April 20, 2000. A single report of his treatment appears in the record. (Ex-2 at 392-6; Cx-File D, 3). Dr. Arrandt recorded an extensive account of Symonette's two September 1997 injuries, the jump from the barge to the bumper system and the other from lifting a large drill, and his treatment by multiple physicians since those injuries, (Ex-2 at 392-3), and summarized the results from Symonette's 1993 and January, 1998 MRIs. Noting Symonette's past medical history, Dr. Arrandt recorded the 1985 lifting injury with lower back pain, which was reported as asymptomatic after one to one and one-half years, and his 1993 car accident with lower back pain (Ex-2 at 393). Dr. Arrandt did not report information regarding Symonette's first back injury from the bus accident. Based on his initial examination of Symonette on November 27, 1999, Dr. Arrandt opined that there was a consistent correlation between Symonette's physical complaints, his own objective findings, and the type of injury sustained in September 1997. Dr. Arrandt recommended and provided chiropractic spinal and extremity adjustments with the addition of adjunctive physiotherapeutic modalities. (Ex-2 at 394).

In his final report, Dr. Arrandt noted that Dr. Wagshul performed an EMG of both lower extremities and his opinion of that was that there was no evidence of any enervation potentials (Ex-2 at 394). By April 20, 2000, Dr. Arrandt found that maximum improvement had been achieved and performed a final evaluation. His final diagnosis included: chronic post traumatic lumbar radiculitis;chronic post traumatic myofascial pain at all paraspinal levels; chronic post traumatic sacroiliac lumbar, thoracic and cervicodorsal subluxation complexes; chronic L-4-5 and L5-S1 disc herniations. He noted that all of the diagnoses were of a permanent nature, and prescribed restrictions that Symonette should avoid moderate-to-heavy lifting and repetitive twisting, turning, and bending, and that he should restrict the time for extended walking, sitting/driving, pushing, pulling, kneeling, balancing and reaching. Finally, Dr. Arrandt assigned Symonette a 15% permanent impairment of the body as a whole, based on the A.M.A. Guidelines to the Evaluation of Permanent Impairment, 1993 Fourth Edition, Revised. (Ex-2 at 394-5; Cx-File D,3).

As noted above, Dr. Alan M. Wagshul, a neurologist, provided a neurologic consultation on March 3, 2000. (Cx-File D, 3). Dr. Wagshul obtained a detailed account of Symonette's two September 1997 injuries, and his treatment by multiple physicians since those injuries. In addition, he reviewed the medical records presented

by Symonette at the evaluation. Upon examination, Dr. Wagshul diagnosed lumbar myofascial and bilateral lumbosacral radicular pains with MRI evidence of discopathies at the L4-5 and L5-S1 levels. Dr. Wagshul saw no surgically remedial pathology at this time, but recommended continued treatment with Dr. Arrandt, an EMG of both lower extremities and H reflexes. (Cx-File D, 3).

Symonette submitted a one page "To Whom it May Concern" letter dated July 3, 2000, from Dr. Anthony Sancetta, an osteopath, (Ex-2 at 387; Cx-File D, 3), recounting that Symonette sustained "significant traumatic injuries and has chronic pain," and referring to a 1985 work-related injury, a 1993 car accident, and "another" work injury in 1997. Dr. Sancetta explained that after each injury, Symonette had physical therapy and medications which permitted him to return to work after the first two injuries, but that "his pain and disability since the most recent injury has prevented participation in the kind of physical labor his profession entails." Dr. Sancetta opined that two avenues have not been explored that may allow Symonette to regain significant pain-free physical functioning. First, he suggested lumbar reductive traction with the Vax-D or equivalent technology, which he explained has demonstrated the ability to non-surgically reduce disc bulging and associated symptomology. Second, he suggested prolotherapy to heal and strengthen damaged ligaments. Dr. Sancetta indicated that he referred Symonette for consultations regarding these modalities. (Ex-2 at 387; Cx-File D, 3)

Dr. Ernest Baustein, a chiropractic physician and N.D., examined Symonette on July 7, 2000. (Ex-2 at 388-391; Cx-File D, 3). He stated that Symonette reported that, "he injured his back while working on a barge and attempting to secure it to the bumper system." His report contains no review of Symonette's prior back injuries, (Ex-2 at 388), but he does note that Claimant received treatment with Drs. Arrandt, Marquez, Reinberg, Watson, Berkowitz, Sassoon, Gieseke, LaRuffa, Glener, and Brown (Ex-2 at 389).

Dr. Baustein performed a general physical examination, range of motion studies, a neurological evaluation, an orthopedic evaluation, and reviewed the January 16, 1998 MRI study findings. (Ex-2 at 389-391). His diagnoses were lumbar disc disorder, radicular pain lower limb, and L4-L5 disc bulge, and mild narrowing of the proximal left neural foramen. Dr. Baustein stated that the normal degenerative changes of the spinal column, which are considered the normal consequences of aging, were prematurely accelerated as a result of the trauma from his September 1997 accident.

Dr. Baustein recommended treatment to stabilize Symonette's condition, to alleviate his debilitating symptoms, and to return all the relevant objective findings to normal levels. His suggested treatment included decompression traction and physiotherapy. He warned that Symonette's condition could worsen and require emergency surgery, though he did not indicate the type of surgery which would be required. Dr. Baustein suggested daily chiropractic treatments for thirty days. (Ex-2 at 391; Cx-File D, 3).

Alison Sue Adams, LMT, of ASA Pain Relief Therapies, Inc provided a status report for Symonette dated August 12, 2000, which indicated that his initial evaluation was October 22, 1999, and that he was last evaluated on August 9, 2000. (Cx-File D, 3). Adams reported that Symonette had made some progress of relatively short duration when treatment was discontinued for more than a few days at a time. It was her opinion as a therapist that hands-on bodywork continued to assist Symonette to function with a tolerable level of pain. (Cx-File D, 3).

Dr. Joseph J. Alshon, an osteopath, examined Symonette on referral from Dr. Sancetta on November 13, 2000. (Cx-File D, 3). Dr. Alshon explained that information was obtained from Symonette, and that he reviewed the June 8, 1999, MRI in addition to "multiple other records" made available to him. Dr. Alshon recorded a history of two September 1997 injuries, a jump from a barge to a fender system resulting in immediate back and chest pain, and increased pain after lifting a large drill three days later. His consideration of Symonette's past medical history included the 1985 and 1993 low back injuries, but not the first back injury related to the bus accident. Dr. Alshon also noted a history of occasional headaches. The clinical data Dr. Alshon reviewed included the June 8, 1999 MRI . In his opinion, it showed a questionable, very small high intensity zone at the posterior aspect of the L4-L5 discs on the sagittal section which was not seen on the transaxial views. He also stated that there appeared to be a bulge and/or disc herniation at the L4-L5 level.

Upon examination, Dr. Alshon noted chronic low back pain greater on the left than right with lower extremity dysesthesias. He detected evidence of disc dessication at the L4-L5 level and a questionable annular tear. He opined that Symonette had advancing prior disco genic disease which was exacerbated as a result of the 1997 work related injury. Dr. Alshon assessed Symonette's pattern of pain as suggestive of arthopathy involving the posterior lumbopelvic region, and stated that there was subjective and objective evidence of a posterior lumbopelvic myofascial pain syndrome.

Dr. Alshon recommended several diagnostic and treatment options, including provocative discography; bilateral L4-L5-S1 facet and sacroiliac steroid-anesthetic injections under fluoroscopic; depending on response to the previous recommendation, intradiscal elector thermal treatment or posterior lumbopelvic prolotherapy; bilateral lower extremities EMG-NCs; stop smoking; lose weight; serotinergic inhibitory anti-depressants; participation in the posterior lumbopelvic and lower extremity stretching, strengthening, and conditioning exercise regimen; and detailed medical record review. Dr. Alshon commented that all of his recommendations were medically necessary, and, that while Symonette may be at statutory Maximum Medical Improvement, he was not at rehabilitative Maximum Medical Improvement. He opined that Symonette would most likely have a permanent partial impairment (apportioned) and a permanent partial disability as it related to sequela of his work related injury. (Cx-File D, 3).

Dr. William Feske, an associated radiologist at Central Magnetic Imaging, prepared an MRI report dated November 24, 2000. (Cx-File D, 3). In his opinion, the MRI data revealed a mild left eccentric posterior bulging of the L4-5 intervertebral disc, possible left posterolateral annular fissure and mild left neural foramina encroachment; minor ligamentum flavum and facet hypertrophy at several levels; and no acute lesion in comparison with previous imaging studies. Dr. Feske noted that there was a suggestion of the annular fissure on the January 16, 1998 MRI. (Cx-File D, 3).

Dr. Stephen S. Wender, a specialist in sports medicine and arthroscopic surgery, examined Symonette on November 29, 2000. (Ex-20; Cx-File D, 3). In a detailed report, Dr. Wender reviewed Symonette's medical, injury, and symptom histories, and noted that Symonette related that he had continuous discomfort since the 1993 accident and had been seeing a chiropractor periodically and complaining of back pain radiating into the left leg (Ex-20 at 840). Dr. Wender summarized Symonette's treatment by Drs. Berkowitz, Gieseke, Watson, Marquez, Brown, LaRuffa, and Alshon, (Ex-20 at 840-2), noted that Symonette's November 24, 2000 lumbar spine MRI "once again" showed the presence of the left eccentric bulge at 4-5, a possible left posterolateral annular fissure, and mild left neural foramina encroachment. He also noted that the MRI revealed minor ligamentum flavum and facet hypertrophy at several levels, with no acute lesions in comparison with the prior imaging studies. (Ex-20 at 842). Dr. Wender elaborated slightly upon Symonette's 1985 and 1993 injuries, noting the findings on the 1988 CT scan and 1993 MRI (Ex-20 at 843). Dr. Wender did not mention Simonette's first lower back injury from the bus accident.

Upon examination, Dr. Wender noted Symonette's complaints which indicated that Symonette was beginning to experience pain to his right side. He reported, among other things, that Symonette did not appear to be in acute distress had a normal gait and no atrophy by measurement. (Ex-20 at 843-4). X-rays were taken in the office at the time of the examination. X-rays of the dorsal spine, according to Dr. Wender, showed normal alignment with evidence of mild diffuse degenerative change. X-rays of the lumbar spine showed normal vertebral body alignment with evidence of disco genic narrowing principally at L4-5, and perhaps to a lesser extent, L5-S1. (Ex-20 at 844). Dr. Wender also reviewed the January 16, 1998, and June 8, 1999, MRIs. In regard to the 1999 film, Dr. Wender found that the vertebral bodies were normal in height and signal intensity. He noted evidence of diffuse desiccation of the lumbar intervertebral discs, and at the L4-5 level, noted evidence of a concentric bulge slightly eccentric to the left. He stated that the 1999 study was essentially unchanged from the 1998 study. (Ex-20 at 844).

Based upon the foregoing evaluations, Dr. Wender assessed Symonette's condition:

> At this time, I find the patient to be at maximum medical improvement. I find no further care to be medically necessary as it relates to the accident in question. Based upon my evaluation of the patient, coupled with my review of the medical records, x-rays, and MRIs, I believe at this time what we are dealing with is the normal continuum of symptomology in an individual with a chronic low back condition. This is evidenced by his complaints dating back to 1988 where they were localized with radiation into the left lower extremity, and given his findings on his diagnostic studies, I think all in all there has been no interval change. I believe the chronicity of his symptomology is compatible with an injury dating back to 1985. My review of the newer diagnostic studies shows no true anatomic change in the 4-5 disc, other than what one would normally expect from the normal aging process. I believe the accident in question has left the patient with no additional impairment, and at this time I believe there is no reason why he cannot be back at his prior level of employment.(Ex-20 at 845).

Dr. Robert L. Masson, a neurosurgeon (G.S.), provided a neurosurgical consultation on referral from Dr. Alshon on December 18, 2000. (Cx-File D, 3). Dr. Masson considered Claimant's accident, work and medical history. He commented that Symonette had a significant work up, noting several MRIs and treating physicians, and other objective testing.

On physical examination, Dr. Masson noted, inter alia, that Symonette had full range of motion for all extremities without joint dysfunction, a normal, but slightly antalgic gait, and no atrophy. Dr. Masson found that the November, 2000, MRI suggested slight collapse of the lumbar disc at L4-5, lateral recess stenosis, left greater than right, but not severe. The MRI revealed no acute disc herniation, only chronic degenerative disease. Dr. Masson's impression was lumbo sacral degenerative disease and a history of work-related injury and incomplete maximum medical improvement.

Dr. Masson recommended a conservative course of treatment including physical and aqua therapy. He opined that Symonette might benefit from facet blocks and epidural steroids, and encouraged him to pursue a weight loss program and cessation of smoking. Dr. Masson thought that Symonette might also benefit from psychological intervention to better facilitate his healing progress. Overall, he did not believe that Symonette was a good surgical candidate, nor did he believe that many of his symptoms would be ameliorated by surgical intervention. Dr. Masson doubted that intradiscal electro therapy would help Symonette return to work or ameliorate most of his lower extremity symptoms. He opined that if, after successful conservative treatment and weight loss, Symonette still had evidence of lumbosacral radiculopathy, decompression procedure might be indicated at that point. (Cx-File D, 3)

Joyce Shing, R.N., M.B.A., L.M.T., of The Healing Path, provided a massage therapy summary of Symonette's treatment from May 2, 2000 through February 1, 2001 on February 26, 2001. (Cx-File D, 3). Shing noted that Symonette symptoms, work and medical and reported that she administered the following modalities on a regular basis at least twice a week from May 2000 through February 2001: deep Swedish massage, reflexology, shiatsu, manual lymphatic drainage (Vodder), and "Healing Touch" (energetic medicine). (Cx-File D, 3). Her massage therapy goals were to lower pain by softening/relaxing gluteal and lateral rotators, low back, and leg muscles. Treatment included application of heat to soften the fascia and assistance with range of motion stretches to lengthen the flexor, internal and external rotator muscles. Shing recommended weekly massage therapy.

Dr. Jeffrey T. Haimes, an orthopedic surgeon, examined Symonette on April 30, 2001. (Ex-3 at 470-4). Dr. Haimes recorded a history of two September, 1997 injuries; one on September 19 , and a second on September 22 when felt Claimant felt his back go out while lifting a core drill. Symonette also advised Dr. Haimes of 1993 car accident and injury to his lower back injury and the "industrial accident" in 1985 which caused lower back pain requiring treatment until 1990. (Ex-3 at 471). Symonette did not report his first back injury from the bus accident.

Dr. Haimes considered Symonette's reported treatment from October 1997 through April 2, 1998, by Dr. Berkowitz, when he placed Claimant at maximal medical improvement, and quoted Symonette as saying that he, "protested that premature MMI." (Ex-3 at 470). He also noted the treatment administered by Drs. Sassoon, Drourr, Cafferdio (chiropractor), and Bissoon. (Ex-3 at 470). In addition, Dr. Haimes reviewed the November 24, 2000 MRI, and x-ray and myelogram dated July 14, 1998, the October 16, 1998 MRI, and a June 16, 1999, MRI (Ex-3 at 472-473). Symonette told Dr. Haimes that he endured constant pain in his lower back, left hip, and left lower extremity to his left foot, and pain down the right lower extremity and swelling of his knee since December, 2000. (Ex-3 at 470). Symonette was not working, but informed Dr. Haimes that he would like to participate in vocational rehabilitation which would eventually credential him to work as an insurance adjustor. (Ex-3 at 471).

Upon physical examination, Dr. Haimes found Claimant "an obese 48-year-old man, alert, oriented, in no apparent distress, loquacious." In regard to Symonette's lumbosacral spine, he found no tenderness on palpitation over the paraspinal lumbosacral musculature, no tenderness over the S1 joints, and no palpable muscle spasms although Claimant reported pain in that region,. Symonette's range of motion in his lumbosacral spine had a flexion of seventy-five degrees and permitted him to bend within ten inches of the floor. X-rays of the pelvis taken that day were within normal limits. X-rays of the lumbar spine showed some slight degenerative changes of the superior end plate of the L4 vertebral body and that the disc spaces were well-maintained. (Ex-3 at 472). ).

Dr. Haimes impression was degenerative disc disease at L4-5 with a protruding disc at the L4-5 level and lumbosacral strain and sprain superimposed on degenerative disc disease. He noted that Symonette was clearly able to get up and down from the exam table without difficulty, walk and bend forward without any difficulty, and found that, while Symonette reported pain, the only objective finding was the protruding disc at the L4-5 level as well as the disc desiccation at the L4-5 level. He noted that all

other findings were subjective. Dr. Haimes concluded: "He did have a manila envelop filled with research which included dermatomal patterns and one area dealing with disability, stating that if someone is out of work from a back injury for more than six months, they have a 0% chance of returning to work, and this was highlighted." (Ex-3 at 473).

Dr. Haimes considered the significance of Symonette's two prior injuries to his lower back. He explained that the dermatomal pattern on his right lower extremity did not in any way fit physiologically with the protruding disc. Dr. Haimes noted that the slight degenerative changes of the superior end plate of the L4 also would have nothing to do with the protruding disc. Dr. Haimes reported that Symonette had an excellent range of motion, "Even with his obesity and very large abdomen, he can bend within 10 inches of the floor." (Ex-3 at 473).

Applying the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, Dr. Haimes opined that Symonette has a 7% impairment to the body as a whole (page 3/113 Table 75). He elaborated that Symonette has no impairment based on range of motion because he has full range of motion. The 7% impairment, he explained, was a culmination of the three back injuries Claimant described. Dr. Haimes stated, "Clearly, the MRI findings had pre-existed the 1997 injury, and giving the patient the benefit of the doubt, he has a 4-5% impairment from the 1997 injury. The remainder of the impairment is from the previous injuries." Dr. Haimes added that he had not reviewed any records or MRIs from the previous injuries or any other records from the recent injury other than the materials Symonette brought to the examination. (Ex-3 at 473-4).

Dr. Haimes and Symonette agreed that he could work with restrictions against lifting greater than thirty pounds, no repetitive bending or sitting for more than one hour at a time. Assessing Symonette's prognosis, Dr. Haimes concludes:

> Further treatment would include observation. I did not feel that surgery or any further invasive procedures are necessary. The patient is upset because he feels that if he had a proper diagnosis, then it could be repaired, although the diagnosis is lumbosacral strain and sprain superimposed on degenerative disc disease with a bulging disc at the L4-5 level. As stated above, the degenerative disc disease pre-existed the accident of 1997, and there is no indication that

> this will continually degenerate over a period of time. He ambulates without any difficulty, gets up and down from the exam table without any difficulty, and is able to work with the above restrictions. 3 at 474).

Dr. Haimes was deposed on November 30, 2001. (Ex-3). He reviewed his examination findings (Ex-3 at 446-460), and noted the bulging disc at the L3-L4, which only appeared in the July 14, 1998 myelogram (Ex-3 at 458, 472). Dr. Haimes explained that people who have back pain, regardless of whether they have a bulging disc, generally have periods exacerbation and remission throughout their lives, (Ex-3 at 461), and a triggering event could be something as minor as bending over to dry one's hair with a blow dryer (Ex-3 at 461).

Dr. Haimes testified that at the time he examined Symonette, he did not know whether or not the disc protrusion pre-existed the 1997 incident. At the deposition, however, Dr. Haimes was given the report of Dr. Burke wherein he compared the October 16, 1993, MRI with the June 8, 1999, MRI and July 14, 1998, CT scan and myelogram (Ex-3 at 462-3). Dr. Haimes stated that if he had seen the 1993 MRI at the time of his evaluation of Symonette, he would have given him the same 7% impairment rating, and that if Symonette had been given a 7% impairment rating based on that MRI in 1993, he would conclude that Symonette had not suffered any permanent exacerbation of his preexisting condition (Ex-3 at 463-4). Dr. Haimes was also informed of Dr. Nakache's 1993 assignment of a 7-8% permanent partial orthopedic disability of the body as a whole was based on Claimant's January 28, 1993 car accident. Dr. Haimes agreed that Dr. Nakache's rating was consistent with his own opinion. (Ex-3 at 464). Accordingly, it was Dr. Haimes opinion that if Symonette had an accident in September 1997, the objective findings indicated that, at best, Symonette experienced a temporary aggravation of his preexisting condition (Ex-3 at 464-5). He opined that Dr. Berkowitz's opinion that Symonette was at MMI on April 2, 1998, seven months after the injury, was reasonable, (Ex-3 at 465-6), because once Symonette returned to his baseline after the 1997 incident, he would have been capable of performing the same things he was capable of doing after his 1993 accident. (Ex-3 at 466).[8]

[8]Claimant was scheduled by the District Director for an appointment with Dr. Haimes after Claimant requested that he be provided with an IME.

Dr. Lionel Bissoon, an osteopath and physiatrist, examined Symonette on June 8, 2001. (Cx-File D, 3). Symonette reported that he was injured when he jumped from a barge to a bumper system which caused immediate lower back pain. He also reported that three days later, his back went out while at work Dr. Bissoon summarized Symonette's treatment at the Pompano Beach Workers' Compensation Medical Center and by Drs. Berkowitz, Reinberg, and Alshon. He noted Symonette's 1998 MRI, myelogram, EMG, and SSEP, and his November 24, 2000 MRI. Commenting on Symonette's past medical history, Dr. Bissoon stated, "Significant for an episode of lower back pain in 1985 and 1993." Dr. Bissoon did not detail any injuries and did not relate knowledge of Symonette's first back injury in the bus accident.

On physical examination, Dr. Bissoon noted that Symonette was in no apparent distress, that his heel-to gait was within normal limits, that his trunk and bilateral lower extremity exhibited full active range of motion, and that there was no evidence of musculature atrophy. Dr. Bissoon's impression was: lumbosacral radiculopathy; sprain supraspinous ligament; lumbar paraspinal spasm; and bulging disc at L4-5 and L5-S1. He recommended that Symonette continue his current medication and therapy program and consider intervertebral steroid injections at L4-5 and L5-S1. Dr. Bissoon did not feel that there was a clinical correlation between Symonette's two previous low back injuries and his most recent accident because the symptoms from those injuries were successfully treated with physical therapy and he thought Symonette was pain free for several years prior to his most recent injury.

Dr. Bissoon felt that Symonette's prognosis was poor failure in view of his failure to respond to multiple types of treatment from multiple physicians with multiple recommendations. Dr. Bissoon opined that Symonette was not a candidate for surgery, that he would continue to live with chronic pain, and that he has reached a plateau on his improvement. Dr. Bissoon concluded his evaluation: "In my opinion, no further improvement is possible since the patient has fallen into that group of patient, which leads [to] chronic pain and suffering." (Cx-File D, 3.)

Dr. Robert D. Simon, a board-certified orthopedist, examined Symonette on July 16, 2001. (Cx-File D). Dr. Simon noted the reported injuries on September 19 and 22, 1997, and obtained Claimant's treatment history. His examination included range of motion testing, limb strength testing, and reflex evaluation. He noted that Symonette's gait was satisfactory and that he did not require ambulatory assistance. Assessing Claimant's work status, Dr. Simon opined that Symonette was capable of sedentary

work: lifting and carrying up to ten pounds on an occasional basis; frequent rest periods; avoid bending, stooping, or kneeling outside of normal behavior; excessive stair or ladder climbing and standing, walking, or sitting uninterruptedly for longer than 50 to 55 minutes each hour should be avoided. Within these restrictions, Dr. Simon released Claimant to work five days per week, eight hours per day. He recommended that Symonette perform home exercises, and noted that Symonette might benefit from surgical intervention, but the tests would have to be reviewed before considering such action. (Cx-File D).

Dr. Simon again examined Symonette on July 19, 2001, and reviewed his MRIs. Dr. Simon did not see any significant disc herniation or pathology and no significant disc space collapse. He indicated that the MRI was "from approximately October 2000." He suggested that the annular tear identified on one of the MRI reports might be causing Claimant's trouble; however, he stated that he could not explain the bilateral lower extremity symptoms or the severe pain symptoms. Dr. Simon ordered a new MRI and discogram to further determine the origin of Symonette's pathology. (Cx-File D). Upon referral by Dr. Simon, Symonette underwent a MRI of the lumbar spine on August 6, 2001 at the Jupiter Open Imaging Center. (Cx-File D, 3). Dr. Manuel Martorelli interpreted the MRI. His impression was: minimal disc desiccation at L3-4 and L4-5 and circumferential disc bulges at L3-4, L4-5 and L5-S1 and bilateral facet overgrowth but not central spinal stenosis, lateral recess or foraminal stenosis. (Cx-File D, 3).

Dr. Simon referred Symonette to Dr. Richard Stropp for evaluation. (Cx-File D, 3). Dr. Stropp reported that Symonette described the cause of injury as twisting and falling between a barge and a fender system which caused immediate pain on September 19, 1997. Symonette also claimed that the pain increased in his back and legs when lifting a large drill on September 22, 1997. Dr. Stropp noted that Symonette was evaluated by various physicians and treated with various modalities. Symonette denied any psychological intervention for pain. Dr. Stropp reviewed the findings from the January 16, 1998 and August 6, 2001 MRIs. He noted that Symonette "takes issue" with the August 8, 2001 MRI because he considered the radiologist too young to make a good diagnosis. Significantly, there is no indication of prior back injuries in Dr. Stropp's report.

On evaluation, Dr. Stropp noted, among other things, that Symonette had full range of motion of all four extremities and had normal symmetric muscle mass. In Dr. Stropp's opinion, Symonette has mechanical back pain. He opined that the MRI

indicated bulging annuli and left S1 and intermittent right S1 radiculopathy, which seemed, to Dr. Stropp, to indicate an L5-S1 disc etiology of that pain. That, coupled with mechanical back pain suggested that discogenic back pain a strong possibility. Dr. Stropp indicated that he explained to Claimant the potential risks and benefits of a provocative analgesic discography. (Cx-File D, 3). On August 23, 2001 Dr. Stropp performed a four level provocative analgesic discography at L2-L3, L3-L4, L4-L5, and L5-S1 in the Columbia Hospital Pain Care Center. (Cx-File D, 3). Cognitive responses were recorded as follows:

> L2-L3: The discogram dye pattern was an intact bilocular disc. No objective pain response. Subjective pain response was 9/10. Concordance was positive. Symonette stated that this was his usual pain. Further examination revealed the usual pain was his usual spasm. Anesthetic response to 2% lidocaine 0/5ml was not response to the lidocaine. 1/2 mg of Versed promptly reduced the pain and muscle spasms.
>
> L3-L4: The discogram dye pattern was an intact bilocular disc. No objective pain response. Subjective pain response was 7/10. Concordance was positive. Symonette stated that this was not his usual pain. No anesthetic response tested and spontaneous resolution occurred.
>
> L4-L5: The discogram dye pattern was a leak. He had a left posterolateral fissure with annular containment. There was no spillage out of the disc. No objective pain response. Subjective pain response was 8.5/10. Concordance was positive. Symonette stated that this was his usual pain in the left buttock and left lateral thigh as well as low back. Anesthetic response to 2% lidocaine 1/2 ml was relief and he had positive analgesic response.
>
> L5-S1: The discogram dye pattern was a cotton ball, intact disc. No objective pain response. Subjective pain response was 10/10. This was from another level that was his usual pain. The pain he was having had nothing to do with this disc provocation. (Cx-File D, 3).

On July 29, 2001, Dr. Sancetta referred Symonette to the University of Washington Pain Center program. Dr. Sancetta indicated that he had been Symonette's treating physician over the past four years. He described Symonette's case as complex and attributed Symonette's lack of progress in part to economic limitations, and indicated that the etiology of Symonette's "intractable pain and functional debility" remains unclear. (Ex-File D, 3).

Symonette traveled to the University of Washington Medical Center Pain Clinic for evaluation of his back and lower extremity pain.[9] There he was evaluated by a screening team on September 4, 2001, to determine whether he was a candidate for its intensive pain rehabilitation program. In summary, the Pain Clinic cited three reasons for rejecting Symonette. First, at the time of the examination, it was unclear whether Symonette was a surgical candidate. Second, the Pain Clinic expressed concern about Symonette's emotional involvement with his pending litigation and his "longstanding feud" with the insurance carrier. The Pain Clinic noted that patients do better in its program after issues such as these have been resolved. Third, although Symonette had a vocational plan, he lacked means to enact that plan.

Washington University Evaluation

Lauren Schwartz, attending psychologist, provided a report based on interviews with Symonette, his daughter, and his fiancee, reviews of pain clinic questionnaires which were only partially completed, and available medical records. At the outset, Dr. Schwartz noted that Symonette did not complete his MMPI, stopping after about 150 questions saying he was too exhausted and was having trouble seeing. Dr. Schwartz stated that Symonette did not complete enough items to score the test. In regard to the interview, Dr. Schwartz reported that Symonette did not exhibit any pain behaviors, "although he was very focused on pain problems, the injury at work and his difficulties dealing with the Labor and Industries and medical system regarding his pain problems." She noted that Symonette believes that his pain has gotten worse over the last year, and that his pain is primarily the result of going without treatment; "He wonders if his surgery was approved initially, whether he would be doing much better now."

Dr. Schwartz noted that Symonette's primary hope for the Pain Clinic evaluation

[9] Symonette submitted the relevant materials post-hearing. The vocational assessment portion of the evaluation referenced in the psychological evaluation as provided by Shaheen Virani, M.A., is not part of the submitted exhibit.

was to get a diagnosis and possibly treatment recommendations. Additionally, Symonette stated that his legal case was not adequately handled because it was incorrectly originally put under the Workers' Compensation system. He reported that he had two attorneys, but he fired both because they were "not helpful." Dr. Schwartz noted, "He believes there is some major unfairness in regards to this case and that he is owed money to pay for treatment and back pay." Symonette reported that, even before his injury, he was looking into vocational options and did find out about training for an insurance adjustor, a career he would like to pursue "once his pain problem is better solved."

In her summary and recommendations, Dr. Schwartz noted Symonette's various thoughts and convictions regarding his condition. She described him as "gentleman who has been struggling with a chronic pain problem for the past four years," complicated by his "significant struggle" with the Workers' Compensation System to have appropriate pain treatment. Dr. Schwartz noted that this struggle has become very adversarial, and again noted that Symonette and his family blame his pain problem on his inability to get appropriate treatment. Although Dr. Schwartz stated that this does not appear to be a highly significant factor, she noted:

> The patient does seem to have some illness conviction and is concerned about needing further diagnostic tests and believes that he may need to look for a specific specialist in order to find out what is wrong with him. He may want another surgery. His fiancee appears to be a least somewhat solicitous in response to his pain behaviors. This response may inadvertently increase pain behavior and disability over time by providing attention and response to pain and time out from responsibility.

Based on the foregoing evaluation, Dr. Schwartz concluded that Symonette was not an appropriate candidate for the structured pain management program because of the possibility of surgery and Symonette's pending legal situation, which, "would make positive response to the pain program less likely."

Dr. James Robinson, attending physician, provided Symonette's medical evaluation. He noted that Symonette provided his history, supplementing it with numerous reports from the physicians who treated him in Florida. Symonette indicated that he injured his low back in a lifting accident in 1985 and again injured his low back

in January 1993 in a motor vehicle accident. Robinson stated, "He gives the impression that he never fully recovered from these injuries but was able to function well enough to return to work," and cited a medical note from Florida indicating that Symonette was receiving chiropractic care at the time of his September 1997 injury. Symonette reported two September, 1997 injuries which "changed his condition significantly." Symonette reported the September 19, 1997 incident which occurred when he was forced to jump from a drifting barge to land causing injury to his low back,and the September 22, 1997, injury when his low back "went out" while squatting to lift a drill.

Dr. Robinson reviewed Dr. Dacus's September 22, 1997, report, Dr. Sassoon's February 11, 1999 report which summarized the 1998 myelogram, a pre-February, 1999 MRI, and December, 1998 somatosensory evoked potential study, Dr. Gelblum's January 19, 1999 neurologic and EMG evaluation, MRIs from November 24, 2000 and August 6, 2001, and the multilevel discography of August 23, 2001. Symonette reported his symptoms and that Dr. Sancetta was currently orchestrating his care, and that he sees Dr. Caforetti, a chiropractor, a physical therapist for massage, and Dr. Lopez, a primary care provider. Dr. Robinson noted that Symonette did not demonstrate any dramatic pain behaviors during the interview.

On physical examination, Dr. Robinson found Symonette's mental status "noteworthy in that he expressed a great deal of concern about the biomechanics of his spine and expressed the view that his treatment would have been more effective if he had gone through detailed diagnostic testing shortly after his injury in September 1997, rather than after an interval of several months." Dr. Robinson reported that Symonette appeared stiff, but did not demonstrate an antalgic gait. Among other things, Dr. Robinson noted that Symonette's left calf circumference was 15 3/4 inches versus 16 3/4 on the right. Upon review of the August 6, 2001 MRI, Dr. Robinson observed that disc heights were well maintained throughout; that there appeared to be a Schmorl's node at L5, a very slight desiccation of the L4-5 disc, very mild bulges at several discs; but no compromise of neural elements.

Based upon the foregoing analysis, Dr. Robinson found it difficult to determine the pathophysiologic processes underlying Claimant's pain. He noted that Symonette presented with a history of low back problems dating back, at least intermittently, to the mid 1980s, and that he has had radiating pain into the left lower extremity in conjunction with injuries in 1985 and 1993. Commenting upon the objective testing, Dr. Robinson explained:

> He apparently has undergone a somatosensory evoked potential study that was interpreted as demonstrating bilateral L5 and S1 radiculopathies. In marked contrast, his anatomic studies appear to be quite unremarkable. At least, there does not appear to be an anatomic substrate for a multilevel radiculopathy. To complicate matters further, he has an EMG from 1/19/1999 that demonstrated evidence of at least an old left L5 radiculopathy. Also, he has significant atrophy on the left calf compared to the right side.
>
> Finally, his recent provocative discography indicates that he reported significant pain during needle entry into the L2-3, L3-4, and L5-S1 discs. I do not have any simple way to integrate all of this information. It is quite possible that he did have a left L5 radiculopathy in 1985 and 1993. This would at least be consistent with the EMG findings in January 1999 and the atrophy that he demonstrates in the left calf. At this point, it appears that his pain is primarily mechanical rather than neurologic in origin. His discography suggests that there is no single generator of his current pain. His pain responses during discography raise the possibility of a multilevel degenerative lumbar disc disease, but is worth noting that the MRI scan demonstrates healthy appearing discs. He certainly does not have anatomic evidence of dramatic degenerative lumbar disc disease.

Focusing upon Symonette's reported knee problems, Dr. Robinson obtained no definite history of the injury. From the information available, however, he could not determine whether Symonette had an orthopedic problem or whether he was getting referred pain from his back.

On September 24, 2001, Symonette was back in Florida visiting with Dr. Simon. (Cx-File D, 3). Dr. Simon noted Symonette's continuing subjective complaints. He reviewed the August 6, 2001 MRI, and on physical examination, noted diminished range of motion of the lumbar spine to a moderate degree, negative SLR, and a stiff gait. Dr. Simon's assessment was degenerative disc disease L4-5 with bilateral lower extremity referred pain, and he recommended epidural steroid injections and continued

conservative care. Dr. Simon further suggested that Symonette was a candidate for an L4-5 anterior lumbar interbody fusion. (Cx-File D, 3).

Symonette returned to Dr. Stropp for follow up on his discography on October 1, 2001. (Cx-File D). Dr. Stropp indicated that he reviewed the films with Symonette, showing him that the L2-3, L3-4, and L-5-S1 all indicated normal intact discs. He explained that the L4-L5 had a left posterolateral fissure with annular containment. Dr. Stropp also reviewed the November 24, 2000 MRI. He indicated to Symonette that he might benefit from a single L4-5 IDET (intradiscal electrothermal annuloplasty therapy) procedure which would have a three-fold effect in that he should have a sealing of an annular tear, at least 10% reduction in disc bulge, and cauterization of in-growth of nociceptive neural fibers in annular tear. Dr. Stropp felt that this would be preferable to a surgical procedure in light of all the surrounding normal discs. He noted that an alternative would most likely involve a surgical procedure in which Symonette would have to have fusion across the L4-5 segment. Dr. Stropp's assessment was mechanical back pain secondary to discography proven L4-5 annular tear, left posterolateral.

Symonette returned to Dr. Stropp's office for follow-up on December 5, 2001. Symonette rated his back pain at 6 1/2 to 7 out of 10 and had no leg pain. Dr. Stropp's assessment was mechanical back pain secondary to disco graphically proven L4-5 annular tear left posterolateral. His plan included a second recommendation for an L4-5 IDET procedure as soon as possible, to consider caudal epidural steroid injection by catheter after an epidurogram, return to clinic p.r.n. basis, and prescription for Darvocet-N 100 and continue Celebrex.

On January 23, 2002, Dr. Simon provided a narrative summary, requested by Symonette, outlining his injury etiology, pathophysiology, and treatment recommendations. Dr. Simon reviewed Claimant's symptoms, and medical history and opined that Claimant possibly had a T12 compression fracture at the time of the original or second injury. He noted that Symonette experienced residual pain related to the L4-5 disc degenerative change and aggravation by the injury. He stated that it was difficult to know whether there was preexisting change since he did not have records from the immediate time of the injury or anything before it. Dr. Simon opined that Symonette's significant pain and completion of numerous modalities indicates a motivation to recover.

Dr. Simon explained that a wide variety of treatment options are available to Symonette, though he noted that there was no clear-cut solution to his problem. One

option he suggested was anti-inflammatories, physical therapy, and bracing. A second, included an IDET which might give Symonette some relief but was a controversial procedure despite showing some positive results. Epidural steroid injection was a third option for temporary treatment. Dr. Simon opined that surgical treatment consisting of a spinal fusion of some type is probably the most definitive treatment, noting that Symonette may have significant relief from his pain, although it was not a "100% proposition."

In a February 6, 2002 addendum to the January 23, 2002, summary, Dr. Simon provided a work status evaluation. He opined that Symonette has permanent work restrictions which limit him to light duty, and required lifting no more than twenty pounds on a regular basis, bending, squatting or twisting repeatedly. Dr. Simon also opined that standing or walking is likely to cause Symonette significant difficulty as is maintenance of one position for a prolonged period. Dr. Simon stated, "I believe this will be true even if he has surgical treatment." At the direction of Dr. Stropp, Symonette received caudal epidural steroid injections on February 22, 2002.

Vocational Rehabilitation Data

Theodore S. Bilski is a certified disabilities management specialist prepared a report and testified at the hearing. Tr. 224. Although he did not meet with Claimant, he reviewed Symonette's age, education, work experience, skills, medical condition, and physical limitations, and he conducted a labor market survey. Ex 21; Tr. 225-227, 242. Bilski identified several jobs which he determined were available and suitable for Symonette and he obtained medical clearance from Dr. Gieseke who approved every job Bilski identified. Ex 23; 24; Tr. 228, 235. Moreover, although Dr. Gieseke imposed a lifting restriction of 30 lbs. which was 10 lbs. greater than the 20 lbs. lifting restriction imposed by Dr. Simon, none of jobs Dr. Geiseke approved required lifting of more than 15 lbs. Thus, all of the jobs approved by Dr. Geiseke also fell within the weight restriction Dr. Simon considered appropriate.

Bilski noted that Dr. Berkowitz placed Mr. Symonette on physical and work restrictions which include no lifting over thirty pounds. Dr. Gieseke evaluated Symonette as suffering the same work restrictions described by Dr. Gieseke. Ex 21. Bilski then researched and found available positions which were consistent with Symonette's education and training, as well as his physical capabilities and he

contacted several potential employers. Ex 21. The specific jobs found by Bilski and approved for Symonette by Dr. Gieseke are set forth below:

| Employer | Position | Hourly Wage |
|---|---|---|
| Radisson Suite Inns | front desk clerk | $7.50 |
| Courtyard by Marriot | front desk clerk | $7.35 |
| Byron's Department Store | sales associate | $7.25 |
| Lerner Shops | sales associate | $7.00 |
| Comp USA | sales associate | $7.75 |
| SE Fla Police Trning Center | manned security | N/A |
| Comfort Inn | front desk clerk | $7.25 |
| El Patio Hotel | front desk clerk | $7.00 |
| Music Works | sales associate | $7.50 |
| The Limited Store | sales associate | $7.25 |
| Uptown/Downtown Outlet | sales associate | $7.00 |
| Burdine's Dept Store | sales associate | $7.85 |
| DAL Communications | answering service associate | $6.75 |
| United Restoration | sales/marketing representative | $7.00 |
| Hampton Inn | sales associate | $7.50 |
| Residence Inn | front desk clerk | $7.35 |
| Marshall's Dept Store | sales associate | $7.50 |
| J.C. Penny | sales associate | $7.75 |
| Telcom Services | fund raiser | $8.00 |
| Best Western Inn | front desk clerk | $7.50 |
| Comfort Inn | front desk clerk | $7.65 |

(Ex. 23)

Indeed, Bilski actually procured employment for Symonette with Creative Telemarketing Services located at West Palm Beach, Florida. The job involved fund raising and entailed placing calls via an automated dialing computer system to individuals while requesting donations for charitable organizations. Jose Reblado, Manager, Creative Telemarketing Services provided this employment opportunity. The starting base wage for the position was $8.00 per hour in addition to benefits, advancement opportunities, and a sliding scale bonus incentive program which offers opportunities to earn in excess of $8.00 per hour. Bilski notified Symonette by letter dated December 6, 2001, that he was scheduled for an appointment with Creative at 2:00P.M. December 20 and that he would work from 1:00 P.M. to 10:00 P.M.,

Monday - Friday. Symonette, however, had moved a few miles from Juno Beach to Palm Beach Gardens , Florida, and alleged that he did not receive the letter. Nevertheless, he learned of the job opportunity at the hearing on December 13, 2001, but there is no evidence in this record that he pursued it. Symonette made it clear at the hearing, however, that it was his desire to pursue a career as a structural assessor of residential and commercial buildings which he deemed more compatible with his extensive experience in the building trades than telemarketer. 231; 241-44.

## Conclusions of Law

Before turning to the merits of the claim, two threshold issues must be addressed. Initially, Gold Coast argues that Symonette was not its employee when he was injured but rather was employed by PCL Constructors. We resolve Gold Coast's status first. In addition, Symonette has filed claims under both the Longshore Act and the Jones Act. Since both acts cannot apply simultaneously to the circumstances Symonette alleges, it is necessary to resolve whether he is a seaman or a longshoreman.

### Identifying the Responsible Employer

As previously noted, at the time of injury, Symonette was working as carpenter for Gold Coast Staffing, Tr. 81, on assignment with PCL Civil Constructors to retrofit the wooden fender system protecting superstructure of the drawbridge at Lighthouse Point. Prior to working at PCL, Gold Coast had assigned him to temporary construction jobs. Tr. 157, 158, 185.

Before receiving the PCL assignment, Doug Waggoner, President and Owner of Gold Coast, Tr. 184, sent Symonette for an interview with the PCL project superintendent, John Williams. Tr. 159, 195. The interview was successful and, on August 11, 1997, Tr.159-160, Symonette was assigned to work on a barge with two other carpenters. Tr. 82. Waggoner testified that he thought the PCL job was land based, Tr. 188, and PCL never advised him that Symonette would be working over navigable water. Tr. 188, 210. He acknowledged, however, that a Gold Coast representative usually visited the job sites and reviewed the scope of work to which their workers would be assigned, Tr. 197, and he personally visited the PCL site a couple of times, Tr. 198, but he alleges that PCL was the borrowing employer, and, therefore, it and its insurance carrier are responsible for his injuries. For the reasons set forth below, I conclude that Gold Coast remains Claimant's employer under the Longshore Act.

The word "employer" in §905(a) encompasses both general employers and employers who "borrow" a servant from that general employer. White v. Bethlehem Steel Corp., 222 F.3d 146, 149 (4th Cir. 2000); *see*, Huff v. Marine Tank Testing Corp., 631 F.2d 1140 (4th Cir. 1980); Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935 (3d Cir. 1990); Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977). In Standard Oil v. Anderson, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909), the Supreme Court recognized the concept of the borrowed employee/servant doctrine, holding that a person can be both in the general employment of one company and in the particular employment of another "with all the legal consequences of the new relation." Id. at 220, 29 S.Ct at 253, 53 L.Ed. at 483). Accordingly, the borrowed servant doctrine may establish a borrowing employer's liability for benefits. Total Marine Services, Inc. v. Director, 87 F.3d 774, 30 BRBS 62 (CRT) (5th Cir. 1996); *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996), *aff'g*, Arabie v. C.P.S. Staff Leasing, 28 BRBS 66 (1994).

In Anderson, the Supreme Court initiated a borrowed servant inquire by focusing upon whose work is being performed, and who exercises the power ultimately to control and direct the servants in the performance of their work beyond the mere suggestion as to details. Id. at 221-222, 29 S.Ct. at 254, 53 L.Ed. at 483-484. In Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969), the United States Court of Appeals for the Fifth Circuit clarified the Anderson inquiry and proposed the following nine questions which assist in identifying the responsible employer:

> 1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
> 2) Whose work is being performed?
>
> 3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
>
> 4) Did the employee acquiesce in the new work situation?
>
> 5) Did the original employer terminate his relationship with the employee?
>
> 6) Who furnished tools and place for performance?
>
> 7) Was the new employment over a considerable length of time?

8) Who had the right to discharge the employee?

9) Who had the obligation to pay the employee?

No single factor is controlling, but must each must be weighed as appropriate in each particular case. Barrios v. Freeport-McMoran Resource Partners L.P., Civ. A. Nos. 93-0092, Civ. A. 93-0425, 1994 WL 90456, at *2 (E.D.La. March 11, 1994), citing, Brown v. Union Oil Co., 984 F.2d 674, 677 (5th Cir. 1993); see, Guadet v. Exxon Corp., 562 F.2d 351, 356 (5th Cir. 1977). In this instance, the results are mixed; however, for the reasons set forth below, I find that the answer to questions 1,5,7,8,and 9 is Gold Coast; questions 2 and 6 is PCL; and questions 3 and 4 is negative both with respect to any understanding between PCL and Gold Coast regarding the situs of Claimant's employment and Claimant's understanding of the risks associated with maritime carpentry work.

Control

The record shows that, while working on the Hillsboro Project, PCL directed and controlled Symonette and the work he was performing. Symonette reported to the Project site's on-site management trailer each day (Tr. 160-162, 190; Ex-2 at 260; Ex-7 at 595). John Williams, superintendent at PCL, oversaw field operations, monitored the quality of Symonette's work, and directed his daily job duties through Larry Lytle, Claimant's coworker on the barge. (Ex-2 at 261; Ex-7 at 572,607; Tr. at 163; Ex-7 at 596-598, 603,607). Gold Coast provided neither supervisory control nor safety personnel at the Project site. (Ex-7 at 606). Douglas Waggoner, former president and owner of Gold Coast, testified that Symonette worked for PCL, and it had control over his work. (Tr. 184, 190).

While PCL had control over the details of Symonette's work, Gold Coast maintained control over Symonette's ability to work for PCL and ultimate control over the situs of the PCL's assignments to Claimant. Thus, Waggoner testified that PCL never advised him that Symonette or any other Gold Coast workers would be working over navigable water and, therefore, require coverage under the LHWCA. Waggoner explained that, had a representative from PCL told him that employees were needed to work over navigable water, he would "absolutely not" have supplied them with labor because the insurance premiums paid by Gold Coast were based on the fact that Gold Coast would not be sending workers into a maritime situs. (Tr. 187-189, 212-213). Waggoner tesdtified that he had no indication that the PCL job entailed a maritime situs and he personally visited the job site "a couple of times," but did not recall seeing

Symonette and had "absolutely not" heard that Symonette was engaged in maritime work on a daily basis. Despite his site visits, however, Waggoner never sought to ensure that the various employees he supplied to PCL were working on land and in compliance with his insurance coverage. (Tr. 197-199, 210-213). Indeed, Waggoner testified that had he learned that Symonette was engaging in maritime employment, he would have stepped in and ended that potential liability immediately either by terminating the employee's work entirely for PCL or requiring that PCL utilize Gold Coast employees only for land-based duties.

Waggoner, then, clearly had authority to control PCL's use of Gold Coast's employees at any time, and that he could have exercised that authority not only to restrict PCL's use of his workers but to limit the employees themselves to land duty. Yet, his failure to monitor that work does not negate the ultimate control he maintained over Symonette's maritime assignment. Weighing the relative control that Gold Coast and PCL exercised over Symonette's maritime employment, I conclude that PCL directed his day-to day tasks , but Gold Coast ultimately controlled PCL's use of Symonette's service in maritime employment, and, ultimately, could have, and as Waggoner testified, should have prevented the assignment which ultimately led to Claimant's injuries. Under circumstances in which the temporary staffing agency specifically did not wish to permit its employees to engage in maritime employment but failed to communicate that limitation either to its workers or the borrowing employer, thus exposing itself and its workers to the hazaeds of maritime work. Since there is no evidence that PCL misled Gold Coast with respect to the duties it assigned to Gold Coast workers, Gold Coast ultimately could and should have controlled the conditions of Symonette's employment which led to injuries by vetoing his assignment to the bargel. (Question no.1– Gold Coast).

Whose WorkWas Performed and
Who Supplied The Tools

Gold Coast was in the business of providing worker and PCL was in the business, in this instance, of rehabilitating the Hillsboro Inlet Bridge. Both firms derived income from Claimant's services, and the work of both was advanced by his employment. The case law indicates, however, that the provision of workers to further the business of the borrowing employer means that the worker was, in fact, performing the work of the borrowing employer. Accordingly, Symonette was performing the work of PCL. Barrios v. Freeport-McMoran Resource Partners L.P., Civ. A. Nos. 93-0092, Civ. A. 93-0425, 1994 WL 90456, at *2 (E.D.La. March 11, 1994), citing, Capps v. N.L. Aroid Industries, Inc., 784 F.2d 615, 617 (5th Cir. 1986). (Question No. 2–PCL). The record also shows that PCL provided, with the exception of small

hand tools, (Tr. 85; Ex-7 at 595), the equipment including the core drill, electric and gasoline powered power tools, pneumatic jackhammer with a point and chisel, circular saw, electric generators, acetylene torches, electric power tools including drills, nails and screws, and electrical cords. (Tr. 85; Ex-2 at 248-250; Ex-7 at 595). (Question No. 6– PCL).

Agreement and Understandings

The record shows that Williams was unsure whether a written agreement existed which defined the business relationship between Gold Coast and PCL. (Ex-7 at 591). The record further shows, however, that PCL had used Gold Coast employees prior to its use of Symonette, and used additional Gold Coast employees besides Symonette on the Hillsboro project (Ex-7 at 159). The details of their relationship are nevertheless lacking in this record.

While Waggoner understood that the job entailed "a little bit more than just your regular carpentry," it appears that neither Williams or Waggoner discussed the possibility that Symonette would work on a barge engaged in maritime employment. Thus, Gold Coast claims that it did not know that Symonette's work for PCL on the Hillsboro Project could or would require his participation in maritime employment, but neither is there an indication in this record that PCL misrepresented the nature or situs of the work it expected Gold Coast workers to perform. Rather, it appears that there was no meeting of the minds, and Gold Coast simply failed to monitor its workers assignments. (Question No. 3–No).

Employee Acquiesence

Nor does it appear that Symonette had an opportunity to observe the conditions under which he was working and whether, after such an opportunity, he chose to continue working. Barrios, 1994 WL 90456, at *4, citing, Brown v. Union Oil Co. 984 F.2d 674 , 678 (5th Cir. 1993); see also, Gaudet v. Exxon Corp., 562 F.2d 351, 357 (5th Cir. 1977). He worked on the barge for less than five weeks (the first one or two weeks of his employment with PCL was not on the bridge but in the inlet) (Ex-7 at 594). At the hearing, Symonette testified that when he took the job at PCL, he did not understand the degree of risk associated with maritime versus shore-side carpentry. The record confirms his contention. He testified that he complained constantly about high wakes caused by local boat traffic and he could not understand why a County Sheriff or Marine Patrolman was not posted on the bridge to prevent boats passing at

excessive speed. (Tr. 84-85). Moreover, on the day of his first injury, September 19, 1997, Symonette noted that the tides were storm-force and that it was harvest moon week creating unusually difficult conditions on the water. ( Tr. 87, Ex-22 at 945). Given the changeability of the tides in the Hillsborough Inlet, Symonette's unfamiliarity with work on a barge under the conditions at the bridge, the short duration of his employment on the barge, and Symonette's complaints about the wake turbulence of other craft, I find that Symonette neither appreciated nor comprehended risks of this employment. (Question No. 4— Claimant acquiesced but failed to appreciate the riske of maritime carpentry work).

Gold Coast Did Not Terminate
Claimant's Employment

Waggoner, on behalf of Gold Coast, visited the Hillsboro Project site and testified that he regularly spoke with the project manager on how the employees were doing and performing (Tr. 198, 211). As explained earlier, Gold Coast provided Symonette with the means to get his physical prior to employment with PCL and arranged for his treatment after injury. Moreover, in Canty v. A. Bottacchi, S.A. de Navigation, 859 F.Supp. 1552 (S.D. Fl. 1994), the Court found that to find a termination, the employer supplying the labor must place no restrictions on the employment conditions of the employees it provides to the alleged borrowing employer. Id at 1558. Here, the record establishes that Gold Coast intended to limit Symonette's employment to non-maritime work. Consequently, because Gold Coast failed to communicate its intent, PCL used Symonette in a maritime employment capacity, but Gold Coast clearly did not intend to terminate his status as a Gold Coast employee.

Moreover, PCL treated Symonette as a Gold Coast employee in respect to medical treatment. He did not sign an employment application with PCL. Ex. 7 pg. 21. Thus, when Symonette was injured on September 22, 1997, PCL called Gold Coast to receive its instructions, and Symonette credibly testified that Waggoner told him to go to the Pompano Workers' Compensation Medical Center. Nor did PCL offer him transportation to the medical center, (Tr. 96-7), although there is evidence in the record that PCL provided such transportation for its own workers. (Ex-2 at 349). The apparent disparate treatment between Symonette and PCL's own workforce is consistent with his status as a Gold Coast employee. Barrios v. Freeport-McMoran Resource Partners L.P., Civ. A. Nos. 93-0092, Civ. A. 93-0425, 1994 WL 90456, at *3 (E.D.La. March 11, 1994), citing, West v. Kerr-McGee Corp., 765 F.2d 526, 526(5th Cir. 1985). (Question No.5–Claimant's relationship with Gold Coast did not terminate.).

## Duration of Employment

Symonette worked for PCL for five to six weeks. Although Symonette was under the impression that he could possibly be employed on a permanent basis, the record shows that he was a temporary worker who supplemented the PCL workforce for the duration of the Hillsboro Bridge project. He did not file out a PCL employment application, (Ex-7 at 587), and the Hillsboro Project was expected to last only six months. (Ex-7 at 574). Nor did Symonette have any commitment that he could become permanently employed by PCL. (Tr. 83, 162-3; 191). He testified that Williams indicated that PCL might offer him a permanent job after a "a ninety-day trial," (Tr. 83), an which Williams denied, but in either eventuality, the prospect of Symonette's permanent employment with PCL was speculative. On balance, it appears that PCL contemplated utilizing Symonette only in his capacity as a temporary employee. (Question No.7–duration of employment –Gold Coast).

## Discharge

The inquiry under this factor is whether PCL could discharge Symonette from his position on the Hillsboro Project and the evidence is mixed. Symonette testified at the hearing that PCL could fire him from the project (Tr. 86). Williams testified that sometime on or before September 19, 1997, he told Symonette that his services were no longer required (Ex-7 at 588-9). It appears, however, that Symonette continued to work for PCL after this alleged discussion with Williams. Waggoner testified that Williams called him on September 19, 1997, and informed him that he wanted to terminate Symonette's employment with PCL. Waggoner, based on this telephone call, testified that he called Symonette and left a message on his telephone answering machine advising that he was terminated from PCL . Symonette claims he never received the message. In either eventuality, however, the record shows that PCL ddid not act directly with Symonette to terminate his employment but instead felt it necessary to inform Gold Coast of its desire to terminate him and await its action. Thus, Symonette showed up at PCL the following Monday and PCL allowed him to work , notwithstanding PCL's desire to terminate him the previous Friday. (Tr. 177, 189, 218-220). Symonette was, moreover, paid for the hours he worked on Monday, September 22, 1997. (Question No. 8—Gold Coast retained the right to discharge).

## Pay

The last of the Ruiz factors explores whether the borrowing employer had the

obligation to pay the employee. This record shows that Symonette worked for Gold Coast, and Gold Coast paid him. To be sure, Gold Coast billed PCL for the labor it provided and received funds from PCL for supplying temporary workers. (Tr. 83, 187). The record, however, shows no direct wage payments from PCL to Claimant, or any obligation on the part of PCL to pay Gold Coast workers.

After analyzing the nine Ruiz factors, I conclude, on balance, that Gold Coast, not PCL, is ultimately responsible for Symonette's maritime work environment and the terms and conditions of his employment at the time of his injuries.

**Jones Act v. Longshore Act**

The record shows that Symonette filed a civil suit against Gold Coast and PCL seeking damages for maritime negligence under the Jones Act. (Tr. 70). Gold Coast contends that the Longshore Act not the Jones Act applies to this claim. (Tr. 72, Gold Coast's Closing Brief at 6). Upon consideration of the record evidence and the applicable case law, I conclude that Symonette's claim is properly before me under the Longshore Act.

The LHWCA covers, inter alia, injuries which occur upon the navigable waters of the United States, including any dry dock during the course of maritime employment and not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); Director, v. Perini North River Associates, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 11 BRBS 320 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to invoke LHCWA jurisdiction, a claimant must satisfy the "situs" and the "status" requirements of the Act. Id. In Perini, the Supreme Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under §2(3). Regardless of the nature of the work being performed, such a claimant satisfies both the situs and the status requirements and is covered under the LHWCA, unless he is specifically excluded from coverage by another statutory provision. Perini, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT). *See also*, Crapanzano v. Rice Mohawk, U.S. Construction Company, Ltd., 30 BRBS 81 (1996); Nelson v. Guy F. Atkinson Construction Co., 29 BRBS 39 (1995) *aff'd mem. sub. nom.*; Nelson v. Director, No. 95-70333 (9th Cir. Nov. 13, 1996); Johnson v. Orfanos Contractors, Inc., 25 BRBS 329 (1992). One such exclusion includes, "a master or member of a crew of any vessel." 33 U.S.C. §902(3)(G). An injured employee who is "master or member of a crew of any vessel" would find proper jurisdictional coverage under the Jones Act.

The Jones Act provides, in part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury[.]... Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. 46 U.S.C. §688.

The Jones Act and LHWCA are mutually exclusive; a "seaman" under the Jones Act is the same as a "master or member of a crew" of any vessel. McDermott Int'l v. Wilander, 498 U.S. 337, 26 BRBS 75 (CRT) (1991); Smith v. Alter Barge Line, Inc., 30 BRBS 87 (1996) (citing, Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991)) (The terms "member of a crew" under the LHWCA and "seaman" under the Jones Act are synonymous). In Chandris, Inc. v. Latsis, 515 U.S. 347 (1995), the Supreme Court described a seaman as:

> (1) an employee whose duties must contribute to the function of the vessel or to the accomplishment of its mission; and
>
> (2) has a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."

Thus, a seamen need not "aid in navigation or contribute to the transportation of the vessel, but he must be doing the ship's work," or contribute to the overall function of the particular vessel. Wilander, *supra*; O'Hara v. Weeks Marine, Inc., No. 00-7872, 2002 WL 483539, at *5 (2d Cir. April 1, 2002), citing, Fisher v. Nichols, 81 F.3d 319, 322 (2d Cir. 1996); *see also*, Coats v. Pernod Drilling Corp., 61 F.3d 1113 (5th Cir. 1995 (en banc). As the Supreme Court has observed: "Land based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore." Weeks Marine, Inc., 2002 WL 483539 at *4, *quoting,* Chandris, 515 U.S. at 361.

Applying the foregoing criteria, it must first be noted that the barge, or barge-

Rabollo configuration, used by Symonette and the other members of the three-man carpentry crew to perform their work is a vessel under the Act, and the intercostal waterway beneath the Hillsboro Inlet Bridge constitutes navigable waters. *See*, Manuel v. P.A.W. Drilling & Well Service, Inc., 135 F.3d 344 (5th Cir. 1998). Since the vessel served to transport workers daily to and from the bridge and provide a floating work platform for the carpenters, Symonette's work upon it facilitated the vessel's mission. Nevertheless, his connection to the vessel was insufficiently substantial to support a finding that he was a seaman.

The record shows that Claimant's work for Gold Coast in the year prior to his injury was essentially land based and unconnected with any vessel. Even during the six weeks he worked at PCL, his assignment was temporary and the duration of his barge based duties was relatively brief. During the weeks he worked at PCL, Symonette toiled both on land and on the barge, but in either case the PCL work was itself temporary in duration. He never spent a night on the barge,( EX-7 at 587), and he was not authorized to operate the vessel or assist in its navigation. Those duties were assigned to Larry Lytle, and, at times when Symonette assisted Lytle, such activity was de minimis. (Ex-2 at 263, 266; EX-7 at 579-580; Ex-22 at 942). *See*, Harbor Tug and Barge Co. v. Papai, 520 U.S. 548, 555 (1997); O'Hara v. Weeks Marine, Inc., No. 00-7872, 2002 WL 483539 (2d Cir. April 1, 2002).

Although it is not possible, on this record, to calculate in precise percentage terms Claimant's work on the vessel in comparison with his other land based work for Gold Coast and PCL, in view of his brief, temporary attachment to the vessel, it appears, in light of Nunez v. Clarendon Dredging Inc., --F.3d-- (5th Cir. Apr. 23, 2002), that Symonette is not a seaman. While Nunez was permanently assigned to the dredge and spent 10% of his time onboard the vessel over a period of two years, the Court concluded that he was not a seaman. Yet, Symonette's attachment to his vessel seems even more tenuous than Nunez' connection with his dredge. Unlike Nunez, Symonette was not permanently assigned to work on the barge in maritime employment by either Gold Coast or PCL. His six week connection with the vessel was temporary from the start and subject to change on a daily basis. Thus, assuming he spent full time on the vessel during his entire six weeks with PCL, over a span of a comparable two-year period considered in Nunez, Claimant's percentage on board would amount to 5.7%. (6 weeks ÷ 104 weeks = .057). *See*, Barrett v. Chevron U.S.A, Inc., 781 F.2d 1067 (5th Cir. 1986 (en banc)(focusing the duration of the employee's assignment in relation to his entire work). In essence, while Claimant's work was sporadic, the record shows he was a land-based carpenter on temporary assignment. (EX-2 at 268-270).

I, therefore, conclude that Symonette's assignments at PCL briefly and temporarily placed him aboard a craft which both as a transport vessel and as a work platform but he was essentially a land-based carpenter. Under applicable case law, Symonette is not a seaman under the Jones Act, but rather a maritime employee under §2(3) of the Longshore Act, ( *See*, Director, v. Perini North River Associates, 459 U.S. 297 (1983) (A bridge worker working on a barge or other "vessel" over navigable waters when injured would meet both the situs and status tests.); Walker v. PCL Hardaway/Interbeton, 34 BRBS 176 (2000); Tr. 72-73), and accordingly, the Longshore Act applies to this claim.

**The Compensable Injury**

Gold Coast maintains that Symonette did not sustain injuries on September 19 and 22, 1997, because neither it nor PCL was informed of the injuries until several weeks after they allegedly occurred. Gold Coast also suggests that Symonette was fired on September 19, 1997, and that his allegations are retaliatory. (Ex-7 at 588-9). In support of its argument, Gold Coast offered the testimony of Douglas Waggoner, former president and owner of Gold Coast, and John Williams, superintendent at PCL. (Tr. 183 , 190-192; Ex-7). William's further testified that Symonette threatened "to get" PCL for dismissing him. Ex 7, pg. 23. Several weeks later, Williams was advised by Gold Coast that Symonette was claiming an injury, and he contacted Claimant's co-worker and a supervisor and both informed him that no injury ever occurred on the barge. Ex. 7, pg. 38-39. In light of wage statements indicating that Symonette was paid for work at PCL on the days in question, medical records from September 22, 1997, indicating that Symonette had sustained an injury, and Gold Coast's failure to call as witnesses or depose either Larry Lytle or Peter Barron, the two men aboard the barge who, according to the Employer, confirmed that no incidents occurred, (Ex7,604-605), I find Gold Coast's allegations lack credibility.

The evidence indicates that Symonette was not terminated. His wage earning statements approved by Waggoner of Gold Coast clearly indicate that he performed work on September 19 and 22, 1997; Symonette completed eighteen hours of work from September 18, 1997 through September 24, 1997, which corresponds with his testimony that he ceased working at 10:30 a.m. on September 22. (Ex-12 at 683). Second, Lytle and Barron are PCL employees but were not deposed or called to testify at the hearing. Under these circumstances, Williams' and Waggoner's account of what the alleged eye witnesses, Lytle and Barron, reported them is far less persuasive than a version of events rendered under circumstances which affords Claimant an

opportunity to cross-examine. Third, Symonette was sent to the Pompano Beach Workers' Compensation Medical Center on September 22, 1997. He was admitted to the Medical Center, 12:00 p.m. The timing of his admission to the Center is consistent with the pay records and Symonette's testimony that he reported to work on September 22, 1997, and suffered an injury to his low back lifting the core drill.

Symonette contends that the injury to his lower back causes a permanent disability which prevents him from returning to his former work as a carpenter. Gold Coast responds that Claimant suffered only a temporary exacerbation of his pre-existing degenerative disc disease and suffered no new, permanent injury as a result of the alleged incidents, and in any event, he suffered no loss of wage earning capacity.

Section 20 Presumption

Section 20(a) of the Act provides Claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See*, Merill v. Todd Pacific Shipyards Corporation., 25 BRBS 140 (1991), *aff'd*, 892 F.2d 173, 23 BRBS 12 (CRT) (2d Cir. 1989). It is well settled that a work related aggravation of a pre-existing condition is an injury pursuant to §2(2) of the Act. Gardner v. Bath Iron Works Corporation., 11 BRBS 556 (1979), *aff'd sub. Nom.*, Gardner v. Director, 640 F.2d 1385 (1st Cir. 1981); Preziosi v. Controlled Industries, 22 BRBS 468 (1989); Janusziewicz v. Sun Shipbuilding and Dry Dock Co., 22 BRBS 376 (1989) (decision and order on remand); Johnson v. Ingalls Shipbuilding, 22 BRBS 160 (1989); Madrid v. Coast Marine Construction, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause or primary factor in a disability for compensation purposes; if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Strachan Shipping v. Nash, 728 F.2d 513 (5th Cir. 1986); Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989); Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). As noted above, there is medical evidence in this record which satisfies the above criteria. Since the recent MRI's have been interpreted as indicating a bulging disc or an annular tear and Drs. Brown, Watson, LaRuffa, Arrandt, Baustein, Alshon, and Bissoon have attributed Claimant's current back problems to the September, 1997 incidents at work, the evidence is sufficient to invoke the presumption in Section 20(a).

## Rebuttal

Upon invocation of the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. Merill, 25 BRBS at 144. If the presumption is rebutted, all the evidence is weighed and a decision rendered based upon a review of the record considered as a whole. *See*, Del Vecchio v. Bowers, 196 U.S. 280 (1935). Claimant, however, always has the burden of establishing the nature and extent of the injury. *See*, U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, 455 U.S. 608, 615 (1982); Trask v. Lockheed Shipyard & Constr.Co., 17 BRBS 56, 59 (1980).

While the evidence fails to rebut the presumption with respect the period of temporary total disability Claimant suffered from September 22, 1997 to April 2, 1998, the employer has adduced substantial countervailing evidence which rebuts the presumption that Claimant's present back condition is caused or aggravated by his September, 1997, incidents. Thus, Drs. Berkowitz, Gieseke, Wender, and Haimes each assessed the residuals of the September, 1997 incidents as temporary exacerbations of pre-existing injuries, and each attributed Claimant's present condition and symptoms to his previously existing permanent partial disability. Indeed, the record shows that Claimant was receiving chiropractic treatments for his low back pain prior to the September, 1997 incidents, and this evidence, considered in light of the medical opinion evidence indicating that Claimant's low back impairment is no worse now than before the September, 1997 incidents, is sufficient to rebut the presumption that Claimant's present condition is caused or aggravated by his September, 1997 injuries at work.

## Claimant's Credibility

Since the Section 20(a) presumption has been triggered and rebutted, it is necessary to consider the record as a whole to determine the merits of the claim for compensation based upon an injury to Claimant's back. Upon review of the record evidence, I find that the outcome in large measure depends upon Claimant's credibility. A study of the medical reports reveals that Symonette's complaints of pain to various physicians constitute a key factor in their overall assessment of his condition. The record thus shows that while some physicians felt comfortable relying upon Claimant's subjective complaints, others detected reasons to approach his subjective complaints with a measure of caution.

The evidence in this record substantiates the concern of those who were less credulous in their reliance upon Claimant's subjective complaints. This, of course, is not an observation critical of the doctors. They customarily and routinely rely upon their patients' description of symptoms and accounts of pain in formulating diagnoses and treatment plans. However, when a witness is not credible, his subjective complaints are entitled to no greater weight because they have been filtered through a physician or other health professional and appear in a medical report, than a trier of fact might accord his testimony at a hearing. Moreover, it is the province of the trier of fact to assess credibility not the physician.

There is in this record substantial evidence which persuades me that Claimant is not a credible witness either in testimony at the hearing or when he describes his pain symptoms to his various physicians. Over the years, various physicians have had occasion, based on their experience with Claimant's condition, either to note inconsistencies between their examination findings and Claimant's complaints or directly question the veracity of his complaints. At the hearing, at three depositions, and in the presence of numerous physicians, Claimant reported that his pain is constant and always at a level of 5-10 on a scale from 1 to 10. Indeed, he reported to Dr. La Ruffa in May, 1999, that his pain was constant at a level nine out of ten. Yet, several physicians describe Symonette as a man in no distress, and several found it difficult to reconcile his subjective complaints with the objective medical evidence. Dr. Wender, for example, noted Claimant's pain complaints, but observed that he "did not appear to be in any acute distress, had normal gait and no atrophy measurements." Even Dr. Masson, who assessed an incomplete MMI found that Claimant had a "full range of motion for all extremities without joint dysfunction, a normal gait..., and no atrophy."

Dr. Haimes similarly noted that Claimant exhibited "no apparent distress," no spasms or tenderness over the lumbar region, and lumbosacral spine flexion of seventy-five degrees. In April, 2000, he noted that Symonette was able to get up and down from the examination table without difficulty, could walk and bend forward without any difficulty, and had an excellent range of motion, bending within ten inches of the floor, despite his obesity. (Ex-3 at 470, 473). Dr. Haimes observed that while Claimant exhibits L4/L5 disc pathology, his other findings, including his pain complaints are "subjective." Even Dr. Bissoon concluded that Claimant has a full range of motion, no atrophy, and exhibited no "apparent distress." Dr. Schwartz at the University of Washington confirmed that Claimant was focused on "pain problems," but he "did not exhibit pain behavior."

Shortly after the September, 1997 incidents, Dr. Berkowitz noted that Symonette reported "high" subjective pain levels without evidence of pain behavior. As early as October 3, 1997, Claimant presented himself to Dr. Berkowitz as a "man in no distress," who was capable of reclining, standing, or sitting comfortably, and could forward bend almost eighty degrees. (Ex-11 at 681). Dr. Berkowitz found Symonette had reached MMI on April 2, 1998, when he refused to continue with the work hardening program, even as he failed to manifest visible pain behavior. (Ex-4 at 495-6, 517; Ex-15 at 777).

Claimant's refusal fully to cooperate with professionals seeking to treat or evaluate his condition is not isolated. Symonette voluntarily participated in a psychological evaluation performed at the University of Washington Medical Center Pain Clinic on September 4, 2001, three months prior to the hearing in this case. Despite flying across the country for an evaluation, he refused to complete a required written test, answering so few questions that it could not be scored. The psychologist, Dr. Schwartz, reported that, while Symonette did not exhibit any pain behavior, he was focused on pain problems. Dr. Schwartz opined that Symonette has illness conviction, and noted that he wants "another surgery." Dr. Robinson, the University Clinic's medical evaluator, also noted that Symonette did not exhibit any dramatic pain behavior during the interview. These findings were fully consistent with a previously demonstrated propensity. It may be recalled that Symonette, at Dr. LeRoy's direction, participated in a Hendler Pain Test at the Delaware Pain Clinic on June 5, 1988, (Ex-10 at 668-675). Again, Symonette did not complete one section of the test, yet the interpretation of his score, even accounting for the possible points for questions he did not answer, suggested that he was "an exaggerating pain patient." (Ex-10 at 668).

Indeed, Claimant's appearance at the seven and one-half hour hearing in this case tended to confirm the observations of the medical professionals who have concluded that Claimant can, despite his subjective pain complaints, sit, stand, reach, bend and ambulate over an extended period of time without manifesting signs of pain or discomfort. (*See*, U.S. v. Schipani, 293 F. Supp. 156, 163 (E.D. N.Y. 1968, aff'd 414 F.2d 1262 (2d Cir. 1969). Although it may be suggested that Claimant medicated himself on the day of the hearing, the medication did not, as the transcript amply confirms, interfere with his concentration or ability to express his views, follow complex factual discussions, or carefully construct and articulate his arguments. If he took any medication, it controlled his pain quite effectively for the entire hearing without interfering with his mental ability or functional faculties.

With the experience of adjudicating many back injury claims over the past 22

years as a trier of fact, I observed Claimant at the hearing and was impressed with the fluidity of his movements. While the tasks he performed at the hearing required no heavy lifting, Claimant exhibited no pain associated with the standing, sitting, bending, twisting, or the reaching movements of the type an attorney might perform during the course of a seven hour trial. He brought to the hearing several file folders filled with exhibits which he wheeled in on a small cart. During the course of the hearing, he was able to bend over to retrieve documents from the folders, repetitively rise from his chair, show documents to witnesses or provide them to the court reporter, stand and approach witnesses, twist and lean in his seat to confer with his fiancé who was seated next to him, walk to and from the hearing room during brief recesses, and sit for extended periods of time, all without any apparent distress or complaint that the long hearing was taxing his physical capacity.

During the course of the hearing, Claimant's bending movements were performed smoothly without indications he was suffering any back discomfort. His twisting, standing, sitting, leaning, and reaching movements, although repeated numerous times during the day, did not appear either to cause pain or even cause Claimant to hesitate or guard his movements in anticipation that his movements might cause pain. As the above-mentioned physicians and other health professionals noted, back injury claimants with constant level 5 to 9 pain after a while show outward signs of discomfort which Claimant never manifested to them or at trial. I am not unsympathetic to Claimant's situation, and I do not apply in isolation any form of sit and squirm jurisprudence or index of traits, when I observe that during the entire seven hour hearing, Claimant exhibited no outward signs of any discomfort, let alone pain at level 5 to 9 intensity. To the contrary, Claimant was focused on the proceedings and, from a physical standpoint, appeared fairly relaxed and comfortable in all of his movements at the hearing.[10] My observations are therefore consistent with the observations of Drs. Wender, Haimes, Berkowitz, Schwartz, and Robinson.

For all of the foregoing reasons, I find Claimant's testimony that he constantly experiences back pain at level five or above is exaggerated to a significant degree and lacks credibility. Consequently, to the extent a physician or other health professional relies upon Claimant's account of his subjective pain complaints and symptoms in formulating an opinion concerning the diagnosis, treatment, or etiology of his back condition, the weight accorded that opinion must be diminished accordingly. Now, this is not to say that Claimant is pain free or that he may not, at times, experience some

[10] Post-hearing, Claimant requested a copy of the hearing transcript and suggested that he would travel to Washington personally to obtain it. The transcript was sent to Symonette to obviate the need for travel which back injury patients tend to find uncomfortable and prefer to avoid.

discomfort, but he has exhibited a proclivity, which pre-dates the September, 1997 incidents, to exaggerate his back symptoms when he describes his pain and this seriously undermines the opinion of any doctor who relies upon Claimant's subjective complaints in rendering an evaluation of his condition.

Thus, the record shows that Drs. Reinberg, Brown, Watson, Gelblum, Sassoon, Drourr, LaRuffa, Glener, Arrandt, Sancette, Baustein, Alshon, Masson, and Stropp relied upon Claimant's subjective pain complaints, I find and conclude that their opinions must be accorded diminished weight accordingly. Even with some objective findings which I will address below, I find and conclude that when a physician relies upon a patient's description of his pain as constant at level 5 to 9, the physician is likely to be misled in respect to the nature and seriousness of real symptoms the objective problem may actually trigger. A surgeon, for example, may be more willing to attempt to repair a suspected "bulging disc" if the patient reports severe pain than if the patient demonstrates, as Symonette has, that he is able to bend at the waist, move about fairly easily, sit for long periods of time, twist, bend, and walk about all without outward signs of back discomfort let alone serious pain. It is not out of an absence of compassion that I observe that this record shows the activities of a man who, as Dr. Schwartz observed, is focused on pain but does not exhibit pain behavior. Nor is Claimant's credibility bolstered by the fact that since his first meeting with Dr. Berkowitz, he has continually expressed a personal opinion, unsupported by the medical evidence, that he will not recover and will not be able to return to gainful employment unless he can be a self-employed insurance adjustor.

Maximum Medical Improvement

The record shows that in September, 1997, Claimant sustained injuries which rendered him temporarily but totally disabled. On April 2, 1998, Dr. Berkowitz determined that he reached maximum medical improvement (MMI) with a 6% whole body impairment. Claimant contends that he has never actually reached MMI, and the Employer contends that not only did Symonette reach MMI on April 2, 1998, the residual permanent impairment he exhibited is attributable, not to his September, 1997 injuries, but to his pre-existing condition. Before turning to the etiology of the residual permanent impairment, it is necessary to determine whether Claimant has reached MMI.

An injured worker's impairment may convert from temporary to permanent under either of two tests. Ecklev v. Fibrex & Shipping Co., 21 BRBS 120, 122-23 (1988). Under the first test, a residual disability, partial or total, becomes permanent if, and when, the employee's condition reaches the point of maximum medical improvement.

Phillips v. Marine Concrete Structures, 21 BRBS 233, 235 (1988); Track v. Lockheed Shipbuilding & Constr. Co, 17 BRBS 56, 60 (1985); Drake v. General Dynamics Corp., 11 BR.BS 288, 290 n.2 (1979). Under the second test, a disability is permanent if the employee's impairment has continued for a lengthy period and does not appear subject to a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969);. *See also*, Crum v. General Adjustment Bureau, 738 F.2d 474, 480 (D.C. Cir. 1984); Air America. Inc. v. Director, 597 F.2d 773, 781-82 (1st Cir. 1979); Care v. Washington Metro. Area Transit Auth., 21 BRBS 248, 251 (1988).

The date a claimant's condition becomes permanent is primarily a medical determination. Thus, the medical evidence must establish the date the employee received maximum benefit from medical treatment such that his condition will not improve. Mason v. Bender Welding & Mach. Co., 16 BR.BS 307, 309 (1984); Rivera v. National Metal & Steel Corp., 16 BRBS; Greto v. Blakeslee Arpaia & Chapman, 10 BRBS 1000, 1003 (1979). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. Jones v. Genco. Inc., 21 BRBS 12, 15 (1988).

As noted above, Dr. Berkowitz, an orthopedic surgeon, concluded that Claimant had reached MMI on April 2, 1998, at 6% whole body impairment due to an L4/L5 bulging disc. Thereafter, Dr. Watson, a chiropractor, rated Claimant at 10-15% permanent partial disability; Dr. Arrandt, a chiropractor, assessed Claimant at MMI with 15% impairment; Dr. La Ruffa, a chiropractor, rated him at 5%; Dr. Haimes, an orthopedic surgeon, determined that Claimant had a 7% permanent partial impairment; and Dr. Gieseke, a neurosurgeon, rated Claimant at 5% due to the L4/L5 disc protrusion. Because the assessments of Drs. Watson and Arrandt are, as noted previously, based, in part, upon Claimant's exaggerated pain complaints, I find them less reliable than the assessments provided by Drs. Berkowitz, Haimes, and Gieseke.

Moreover, while Dr. Alshon, an osteopath, commented that Claimant may have reached statutory maximum medical improvement but not rehabilitative maximum medical improvement, and Dr. Masson, a neurosurgeon, found "incomplete maximum medical improvement," there is substantial contrary probative evidence in the record. Yet, permanency does mean unchanging, and may be found even if a remote or hypothetical possibility exists that the condition might improve in the future. *See*, Mills v. Marine Repair Serv., 21 BRBS 155 (1988). Similarly, a temporary worsening of a condition does not render a permanent disability temporary. Leech v. Services Eng'g Co., 15 BRBS 18 (1982). Thus, Dr. Bissoon, concluded that Symonette has "reached

a plateau in his improvement," and Dr. Wender, an orthopedic surgeon, determined that Claimant had reached maximum medical improvement with no further medical care necessary. Finally, if the condition is not expected to improve, the prospect of future treatment or surgery does not preclude a finding of permanency. Consequently, the analyses of Dr. Glener who recommended epidural steriod injections but noted that they would not remedy the underlying anatomical problem, and Dr. Simon, who suggested that spinal fusion surgery might be appropriate, but opined that Claimant would manifest the same physical restrictions "even if he has surgical treatment," do not preclude a finding of permanency, Phillips v. Marine Concrete Structures, 21 BRBS 233 (1985); White v. Exxon Co., 9BRBS 138, Aff'd. 617 F.2d 292 (5th Cir. 1980), are also indicative that Claimant has reached MMI. .

On balance, then, the weight of credible evidence adduced by physicians who rated Claimant's impairment demonstrates that he reached MMI on April 2, 1998 at 6% of the whole body as determined by Dr. Berkowitz. For the reasons previously discussed, I find Dr. Berkowitz' rating the most credible as essentially confirmed by Drs. Haimes and Gieseke who rated Claimant 1% higher and 1% lower, respectively.

Whether the 6% Permanent Partial Disability
is Attributable to the September, 1997 Incidents
or Claimant's Pre-Existing Condition

The employer argues that Claimant's current condition is due to his pre-existing condition not his September, 1997 injuries. It may be recalled that Dr. Nakache, in 1993, determined that Claimant had a 7%-8% permanent partial disability rating as a consequence of the L4/L5, L5/ S1 low back injury he suffered in an auto accident. Dr. Nakache's rating is significant because the alleged low back residuals of the 1997 industrial accidents can only be evaluated in the context of Claimant's pre-existing condition. Thus, Dr. Berkowitz testified that he treated the same area of the back involved in the previous injury and that Claimant, by April, 1998, returned to his pre-September, 1997 physical state. Dr. Gieseke, upon learning of Claimant's pre-existing impairment, testified that Claimant, post-September, 1997, manifested the same impairment of the whole body due to the L4/L5; L5/S1 discs that he had in 1993, which

he assessed at 5%. In Dr. Gieseke's opinion, the September, 1997 incidents caused only a temporary exacerbation of a pre-existing problem.

In determining whether the September 19 and 22, 1997 incidents caused any permanent back injury, the objective medical evidence in the record has been carefully considered. Since the presumption is no longer applicable, the burden of proof in respect to causation remains with claimant. On this record, I am unable to conclude that he has established that any of the objective signs of low back pathology on the recent clinical tests are caused, related, or aggravated by the September, 1997 incidents at work.

The record shows that since his release from the care of the Pompano Beach Workers' Compensation Medical Center in early October 1997, Symonette has been examined by or sought treatment from, at least, several orthopedic surgeons, several neurologists, six chiropractors, a massage therapist, a physiatrist, two osteopaths, a dually certified physiatrist and osteopath, and six physicians whose credentials are not of record, but most appear to be certified in fields related to pain management. I have reviewed the extensive medical evidence in this case, reexamining several times each medical opinion to determine whether the medical experts reached a consensus regarding the etiology of Claimant's condition.

Symonette's immediate treatment for the September, 1997 incidents at the Pompano Beach Workers' Compensation Medical Center resulted in a diagnosis of acute and recurrent low back sprain. The Medical Center physicians were aware of Symonette's pre-existing condition and continuous treatment for pain related to that condition. From his first treatment on September 22, 1997, he was released for work with restrictions. In less than two weeks, he was released from all treatment at the Medical Center as a man in no acute distress who could sit, lie, or stand without any apparent discomfort and could bend forward almost eighty degrees, as compared to forty-five degrees on September 22.

Drs. Berkowitz, Haimes, and Wender, the three orthopedic surgeons who, from time to time, examined Symonette and reviewed evidence relevant to his previous condition all agreed that Symonette experienced a temporary exacerbation of his degenerative disc disease, and that an annular fissure revealed on more recent MRIs and discography was part of the degenerative process, not the September, 1997 incidents. While Dr. Simon, Symonette's most recent treating orthopedic surgeon, agreed that he had degenerative disc disease at L4-5 with pain aggravation caused by the most recent injury, he could not reconcile Symonette's pain complaints with

objective findings, and conceded that he could not evaluate the effects of the preexisting condition because Symonette did not provide him with any relevant medical records. In contrast, Dr. Gieseke, a neurosurgeon who reviewed the pre-existing medical data, concluded that Symonette suffered from a degenerative disease with no additional permanent injury related to the 1997 incidents.

Although Drs. Brown and Gelblum opined that Symonette's current condition is causally related to the 1997 incidents, neither opinion is entitled to substantial weight. Dr. Brown examined Symonette and reviewed the 1993 and 1998 MRIs. He opined that the structural imaging did not look impressive, the lumbar spine revealed no palpable spasm, no definite tenderness, no sciatic notch tenderness, and no piriformis tenderness, but did reveal atrophy of the left calf. Dr. Brown was aware of Symonette's 1985 and 1993 injuries, but he opined that Symonette's condition was a direct result of his most recent incident. He did not, however, provide a rationale for this conclusion, nor did he indicate whether he was aware that Symonette had left calf atrophy as a result of his prior low back injuries. Significantly, Dr. Brown failed to discuss his etiology assessment in the context of his numerous negative clinical and examination findings. Accordingly, his opinion is not well-reasoned and is entitled to little weight.

Similarly, Dr. Gelblum, who diagnosed post-traumatic left L5 radiculopathy, stated that Symonette's past medical history was non-contributory to his current condition, because he was "asymptomatic of lumbar complaints prior to this work accident." Dr. Bissoon also negated any connection between Claimant's present condition and his pre-existing injuries on the ground that Claimant had been successfully treated for the prior injuries and was "pain free' for many years prior to the most injury. Yet, these assumptions by Drs. Gelblum and Bissoon are incorrect. The record shows that Claimant's pain complaints continued long after he sustained the three prior back injuries and his reported symptoms never fully resolved. Because they rely on an erroneous premise that Symonette was asymptomatic of back pain prior to 1997 incidents, the weight accorded the etiology assessments by Drs. Gelblum and Bissoon must be diminished.

The record shows that six chiropractors have treated Claimant since the September, 1997 incident and have provided opinions that Symonette's symptomology is related to the 1997 incidents. (Cx-File D, 1). In addition, several physicians with various certifications, some of which are not of record, discussed the cause of Symonette's condition. Dr. Sassoon, a physiatrist, opined that in light of Symonette's history of injury, he had chronic radiculitis of a persistent degree, but he did not identify

causes of Symonette's symptomology. Dr. Alshon, an osteopath, opined that Symonette had advancing prior discogenic disease which was exacerbated as a result of the 1997 work related injury. Dr. Glener, of the Treasure Coast Center for Surgery, whose credentials are not of record, also opined that Symonette's 1997 incident exacerbated and worsened his previous back pain.

The record shows that Dr. Reinberg did not opine in regard to the etiology of Symonette's condition. Dr. Drourr, Director of Jupiter Pain Management Center, whose credentials are not of record, stated that he diagnosed lumbar disc disease with resultant left L4-5 and S1 radiculopathy, but Dr. Drourr did not identify the incident or accidents which he believed caused the disc disease. Dr. Stropp of Intervential Pain Management of Palm Beach, whose credentials are not in the record, performed on Symonette a four level proactive discography on August 23, 2001. An L4-5 left posterolateral fissure visible on earlier MRIs was definitively detected and found to have annular containment. Dr. Stropp's assessment was mechanical back pain secondary to discography proven L4-5 annular tear, left posterolateral. Dr. Stropp did not, however, opine in regard to the etiology of the annular tear. (Cx-File D, 3).

Finally, Dr. Robinson, whose credentials are not of record, believed it was "quite possible" that Symonette had L5 radiculopathy in 1985 and 1993, which would be consistent with the January, 1999 EMG findings and Symonette's left calf atrophy. He opined that Symonette's pain responses during the discography raise the possibility of multilevel degenerative lumbar disc disease; however, in his opinion, the MRI scan demonstrated healthy discs. Moreover, Dr. Robinson was careful to note that Symonette presented with a history of low back problems dating back to the mid 1980s, and that he has had radiating pain into the left lower extremity in conjunction with injuries in 1985 and 1993. Accordingly, although Dr. Robinson was unable to provide a clear cut diagnosis, he indicated that he believed the evidence before him suggested that Symonette's condition could be linked to his prior injuries.

Upon review of the conflicting medical opinions regarding the etiology of Claimant's present condition, I find that Dr. Berkowitz, Gieseke, Wender, Haimes, have, to a more comprehensive degree than the other medical experts, specifically and carefully compared the pre-existing clinical data with Claimant's post -September 1997 clinical data. Dr. Berkowitz, following a review of the 1993 clinical data, testified that he treated Claimant in the same area of the back and for essentially the same complaints Claimant reported in 1993. Dr. Gieseke similarly opined that Claimant suffered only a temporary exacerbation of his pre-existing problem following a comparison of the a 1993 MRI and the recent myelogram and MRI studies. Dr. Wender reached essentially the same conclusion following a comparison of a 1988 CT scan and a 1993 MRI with the 1998 and 1999 MRI's. Even Dr. Haimes, who initially attributed

a portion of Claimant's present impairment rating to the September, 1997 incidents, re-evaluated his opinion when afforded an opportunity to compare the data. Upon consideration of the 1993 MRI results with the 1998 myelogram and CT scan and the 1999 MRI data, Dr. Haimes opined that the data comparisons he had not previously performed, persuaded him to change his assessment and conclude that Symonette had not suffered any permanent exacerbation of his pre-existing condition. Additionally, while Drs. Simon and Stropp opine that Symonette's low back pain might be related to the annular fissure, Dr. Simon noted that he lacked sufficient information to compare Claimant's prior condition with his present problem, and Dr. Stropp had no opportunity to compare the results of his discogram with any of the prior clinical data.

I have also accorded greater weight to the opinions of Drs. Wender, Haimes, Berkowitz, and Gieseke than the contrary opinions of the six chiropractors who evaluated Claimant on the ground not only that Drs. Wender, Haimes, Berkowitz, and Gieseke relied less upon Claimant's pain complaints, but on the basis of their superior medical credentials in evaluating the pre-existing clinical data in comparison with the most recent MRI, EMG, myelogram, nerve conduction studies, and x-ray data and in diagnosing and assessing the disease pathology of Claimant's current condition.

For all of the foregoing reasons, I find and conclude that Claimant, in September of 1997, suffered a temporary exacerbation of his pre-existing injuries. He reached maximum medical improvement on April 2, 1998, with no residual permanent impairments beyond those which he suffered as a result of his pre-existing conditions.

## Wage Earning Capacity

Although Claimant has failed to show that the September, 1997 incidents caused any impairment which permanently increased his disability associated with his pre-existing condition, the employer has otherwise established "suitable alternative employment," and a wage earning capacity which exceeds Claimant's average weekly wage. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir., Nov. 1981). P&M Crane Company v. Hayes, 930 F.2d 424 (5th Cir. 1991); Rogers Terminal and Shipping v. Director, 784 F.2d 687 (5th Cir. 1986); New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Lentz v. Cottman Company, 852 F.2d 129 (4th Cir. 1988; Diaosdado v. John Bloodworth Marine, 29 BRBS 125 (9th Cir. 1996); Hairston v. Todd Shipyards Corp., 21 BRBS 122 (CRT) (9th Cir. 1988); Palombo v.Director, 25 BRBS I, 937 F.2d 70 (2d Cir. (1991). Should it subsequently be determined that Claimant's injuries were not temporary, I enter the following supplemental findings which assume, solely for the purpose of the wage earning capacity analysis, that his present physical limitations are attributable to the September, 1997 incidents.

Section 8(c)(21) provides that an award for unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. In assessing wage-earning capacity, a number of factors may be considered, including claimant's physical condition, age, education, industrial history, and availability of employment which he can perform after the injury the claimant's earning power on the open market, whether he must spend more time or use more effort or expertise to achieve pre-injury production, and whether medical and other circumstances indicate a probable future wage loss due to the work-related injury. Warren v. National Steel & Shipbuilding Co., 21 BRBS 149, 153 (1988); Hughes v. Litton Svs., 6 BRBS 301, 304 (1977). Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 651 (1979).

Although not every possible factor need be addressed or assigned an individual monetary value, the final determination of wage-earning capacity should reasonably reflect appropriate factors, such as:

(1) physical condition;
(2) age;
(3) education;
(4) industrial history;
(5) availability of employment;
(6) beneficence of a sympathetic employer;
(7) claimant's earning power on the open market;
(8) whether claimant must spend more time or use more effort or expertise to achieve pre-injury production;
(9) whether medical and other circumstances indicate a probable future wage loss due to the work-related injury;
(10) loss of overtime (previous available overtime worked by claimant); and
(11) continuity and stability of claimant's post-injury work.

The ultimate objective of the "wage-earning capacity formula is 'to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant as injured."' Randall v. Comfort Control. Inc., 725 F.2d 791, 795, 16 BRBS 56, 61 (CRT) (D.C. Cir. 1984) (quoting 2 A. Larson, The Law of Workmen's Compensation § 57.21, at 10-101 to 10-102 (1982)). The relevant labor market is the local one, i.e., the place of injury. Lumber Mut. Casualty Ins. Co. v. O'Keefe, 217 F.2d 720, 723 (2d Cir. 1954). The testimony of a vocational expert assessing the work a claimant can perform with his disability and the wages paid for this work, is often determinative on this issue. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979).

Initially, it must be concluded on the medical evidence in this record that Claimant can physically perform sedentary-type work. This is not to suggest that Claimant is asymptomatic or pain-free, but his treating physicians have released him to work, with restrictions, and jobs which accommodate those restrictions are physically suitable for him. Indeed, Dr. Dacus, Dr. Berkowitz, Dr. Gieseke, Dr. LaRuffa, Dr. Wender , Dr. Arrandt, Dr. Simon, and Dr. Haimes each have concluded that Symonette can work with restrictions. ( *See, e.g.*, Dr. Berkowitz (restriction of no lifting of weights greater than 30 lbs.); Dr. Gieseke (Claimant is capable of light duty, but should stay away from jobs where he has to lift over 35 lbs., particularly in a repetitive fashion); Dr. LaRuffa (Symonette may return to monitored regular duties as long as no additional exacerbations occur."); Dr. Wender (Claimant can to "prior level of employment.");Dr. Arrandt ( Claimant should avoid moderate-to-heavy lifting and repetitive twisting, turning and bending, and restrict the time for extended walking, sitting/driving, pushing, pulling, kneeling, balancing and reaching); Dr. Haimes (Claimant can work with restrictions for lifting greater than 30 lbs., and no repetitive bending ina sedentary position and walk every hour approximately so that he is not sitting for more than hour at a time.); Dr. Simon(Claimant's restrictions include lifting more than 20 lbs. on a regular basis, bending, squatting, or twisting repeatedly, prolonged standing or walking, and prolonged maintenance of one position. He believes Claimant is capable of light duty)).

Thus, Dr. Gieseke described Claimant's physical limitations and the Employer's vocational expert analyzed Claimant's age, education, and experience, in light of those limitations and prepared a list, consistent with Hayes, *supra* and Turner, *supra*, of at least twenty jobs which were specifically approved by Dr. Gieseke. I have further compared the requirements of these jobs with the slightly more restrictive limitations described most recently by Dr. Simon, and I find that the jobs are also consistent with Dr. Simon restrictions. These jobs were reasonably available and impose physical demands which fall within Claimant's capabilities.

Yet, even beyond the general availability of suitable employment opportunities, the Employer here has exceeded the burden imposed by Second Circuit in Palombo, *supra*, and the Fifth Circuit in Turner. Consistent with Dentz, *supra*, and Diaosdado, *supra*, the Employer actually arranged for Claimant's employment in a specific and suitable job. This evidence, I find, is sufficient to satisfy the Employer's burden whether it is required to demonstrate general categories of jobs Claimant can perform and one or two which are available, (*See*, Hayes, Turner, and Palombo), or several specific available jobs Claimant can perform. (*See*, Diaosdado and Hairston, *supra*). The jobs which were listed by the vocational expert and approved Dr. Gieseke constitute suitable alternate employment.

Moreover, Claimant is an educated, articulate, and personable gentleman who readily concedes that he did not seek employment. The Second Circuit observed in Palombo, "[w]e believe that a Claimant's lack of success after diligent searching for a suitable job may be equally or even more probative of actual job availability than a vocational expert's job survey." *See also,* New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981). Despite the advice of his treating physicians that he is physically capable of performing light duty jobs with the restrictions they have imposed, Claimant here, for nearly a four years, took no initiative on his own to find suitable employment. In contrast with the claimant in Palombo, Symonette has made no effort to find a job.

To the contrary, as noted above, Bilski actually procured employment for Symonette with Creative Telemarketing Services located at West Palm Beach, Florida. The job entailed fund raising by placing calls via an automated dialing computer system and requesting donations for charitable organizations. Jose Reblado, Manager, Creative Telemarketing Services provided this employment opportunity with a starting base hourly wage of $8.00 in addition to bonuses, benefits, and advancement opportunities with an incentive program. Symonette was scheduled to work from 1:00 P.M. to 10:00 P.M., Monday - Friday. While the initial letter advising Claimant of this opportunity may have been misdirected, he learned about at the hearing in time to pursue it had he had any interest. Despite extensive post-hearing comments filed by Claimant, there is no indication that he elected to follow-up on this opportunity. *See*, Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985); Dove v. Southwest Marine, 18 BRBS 139 (1986).

Thus, the record shows that the salaries of the jobs approved by Dr. Gieseke ranged from $6.75 per hour to $8.00 for Telcom Services fundraiser. Based upon consideration of the record as a whole, including the fact that Claimant has not worked in any gainful way for nearly four years, I find that his wage earning capacity is accurately approximated by jobs such as desk clerk, fund raiser, and sales associate paying in the range of up to $8.00 per hour or $320.00 per week.

These jobs are suitable and provide a realistic indication of Claimant's wage earning capacity assuming a diligent job search. Thus, Claimant's wage earning capacity exceeds his average weekly wage.

For all of the foregoing reasons; Accordingly:

ORDER

IT IS ORDERED that the claim filed in this matter by Henry C. Symonette be,

and it hereby is, denied.

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Stuart A. Levin
Administrative Law Judge